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The recent decision, by the United States Supreme Court, of the case of Northern Pacific Railroad v. Arnato, seems to extend the jurisdiction of that court beyond the limits intended by the framers of the bill providing for the federal courts of appeal, and restricting the appellate jurisdiction of the Supreme Court. In the case mentioned it is held that the decision of a United States Circuit Court of Appeals on a writ of error to the final judgment of a United States Circuit Court is not final in a case where the jurisdiction of the circuit court depends solely upon the fact that the defendant is a corporation created by an act of congress, and consequently the suit arises under a law of the United States.

Before the passage of the act in question, the United States Supreme Court had no appellate jurisdiction in such cases where the matter in controversy was less than five thousand dollars. The effect of this decision, however, is to give jurisdiction in such cases where the matter in controversy exceeds one thousand dollars. By the constitution and supplemental statutes the courts of the United States have jurisdiction in cases arising under the constitution and the laws of the United States, and it is settled doctrine that a case to which a corporation chartered by congress is a party arises out of the laws of the United States, and is therefore cognizable by federal courts. The circuit court of appeals act provided that the judgments or decrees of that court should be final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States." Another section of the act provides that in all cases not thereinbefore made final, "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs." The fact that the act does not enumerate, as one of the cases where the court of appeals decision is final, the jurisdiction dependent upon a law of the United States, leads the court to conclude that such cases may be reviewed on appeal both by the circuit courts of appeal and the supreme court, provided the matter in controversy exceeds one thousand dollars, besides costs.

Though the effect of the decision will undoubtedly be to open the doors of the supreme court to many cases not contemplated by the framers of the bill, who had in view the relief of that court by restricting its jurisdiction, we hardly agree with the *New York Law Journal*, which declares that by reason of this decision, "the supreme court, unless further relieved by congress, will henceforth find its docket more crowded than before, and will from year to year fall further in arrears." The number of cases arising out of a law of the United States, and thus reviewable by the supreme court, is quite limited, and not so numerous, in our judgment, as to produce the result predicted.

A correspondent of the *Weekly Law Bulletin* labors hard to show that the case of Deem v. Resinger, upon which we lately commented (34 Cent. L. J. 247), holding that one who murders his parents for the purpose of inheriting their property, is not thereby prevented from inheriting, was incorrectly decided. He attempts to reconcile the conflict of decisions by suggesting that the question of motive should be the controlling one in cases of this kind. If the murder was committed with the intent to profit, then the wrong-doer should not enjoy the fruits of his wrongful act.

We don't see that this brings us any nearer a solution of the question. In all these cases the vicious motive is conceded, else there would be no question as to the right of inheritance. The correspondent also urges the doctrine of equity, that "one shall not profit by his own wrong," which has been repeatedly invoked in this class of cases. The doctrine is not denied, and is a good one when properly interposed, but we do not see that it has anything to do with the administration of a plain and unequivocal provision of statute. Neither do the insurance cases cited by the correspondent shed any light upon the

question. The interpretation of the terms and meaning of a contract of insurance is very different from the construction of a statute of wills and of descents and distribution.

NOTES OF RECENT DECISIONS.

CARRIERS OF PASSENGERS—NEGLIGENCE—RIGHTS OF PERSONS NOT PASSENGERS.—In Lawton v. Little Rock & Fort Smith Ry. Co. the Supreme Court of Arkansas hold that a person who enters a railroad car to assist a lady to a seat cannot demand that the train be held for the full length of time usually required for passengers to get on or off at that place, but only that it be held long enough for the said person to get off, upon notice to the trainman that he desires to do so. Hemingway, J., says:

The defendant insists that inasmuch as the plaintiff did not enter the car to take passage upon it, but only as escort to a passenger, the defendant owed him no duty except not to injure him willfully or wantonly, while the plaintiff contends that as he went upon the car with the knowledge of the trainmen, and for the purpose of rendering necessary assistance to a female passenger and little child, the defendant owed him the same duties as a passenger. The learned counsel who has presented the cause for the plaintiff cites us to no authority in support of his contention and it impresses us as unsound. The cases relied upon by the defendant do not, as we think, bear out his position, but show that it is untenable. Lucas v. Railroad Co., 6 Gray, 64; Doss v. Railroad Co., 59 Mo. 34; Coleman v. Railroad, etc., Co., 84 Ga. 1. We have concluded that neither view is correct, but that reason commends as proper a rule between the two. In the case of Railroad Co. v. Crunk, 21 N. E. Rep. 31, the Supreme Court of Indiana held that a railroad company owed the same duty to those assisting a passenger upon a train as to the passenger himself, but it cites no precedent for the ruling, and it is opposed to all cases adjudged upon the subject to which our attention has been called. The law exacts of railroads for the protection of passengers the highest degree of care, and imposes a liability for all injuries which sound judgment, skill and the most vigilant oversight could have prevented, but this responsibility grows out of the relation or contract of carrier and passenger, on account of the great perils of the undertaking. As this is the cause and origin of the rule, it would seem that the rule should be restricted in its application to persons who come within that relation, and such is the effect of the authorities. Lucas v. Railroad Co., 6 Gray, 64; Doss v. Railroad Co., 59 Mo. 34; Coleman v. Railroad, etc., Co., 84 Ga. 1; Griswold v. Railroad Co. (Wis.), 26 N. W. Rep. 101; Thomp. Car., p. 49, § 7. But a denial that the extreme responsibility contended for exists is not an affirmance of the rule that responsibility is restricted to wrongs that are willful or wanton. Such conclusion would rest upon the premise that one attending a passenger enters the cars from curiosity, or upon his own business, under a mere license from the company, and not upon business connected with the company, upon an implied invitation. If this premise be false, and the converse correct, then according to the decisions of this and other courts the carrier would be bound to the exercise of ordinary care (Railroad Co. v. Fairbairn, 48 Ark. 491; Holmes v. Railroad Co., L. R., 4 Exch. 254), and that it is so bound in cases like this is held in the cases first cited, as well as in others upon the subject. Gillis v. Railroad Co., 59 Penn. St. 129; Griswold v. Railroad Co. (Wis.), 26 N. W. Rep. 101. In our opinion the rule is correct upon principle. For it is a matter of common knowledge that in the usual conduct of the passenger business it often becomes necessary for those not passengers to go upon cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for the security and convenience of the traveller, it has proven beneficial to carriers, and now prevails in this State, and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. It cannot be doubted that it has increased travel and the earnings of carriers, while it has promoted the convenience and security of passengers, and if it should be abrogated many persons would be compelled to forego journeys, to the detriment of the carrier and their own inconvenience. We conclude that such attendant performs a service in the common interest of carrier and passenger, and that his entry upon a car is upon an implied invitation, which entitles him to demand ordinary care of the carrier.

PRINCIPAL AND SURETY—BOND—ERASING NAME—RELEASE OF SURETY.—In State v. Allen, decided by the Supreme Court of Mississippi, co-sureties signed a penal bond while in the hands of the principal obligor, on condition that such bond should not be a completed instrument until enough co-sureties had signed and justified, in the respective amounts signed by each, to make up the full penal sum, and the bond duly delivered to the proper officer for approval as required by law. After the requisite solvent co-sureties had signed, the name of one was erased by drawing a line through his signature, his name in the body of the bond and in the jurat, with the consent of the principal obligor, but without notice to the other sureties. The bond was subsequently delivered to the proper officer for approval, his attention called to the erasure and the bond was then approved by him. It was held that the erasure and discharge of the one co-surety, having released all those who signed after him, all the other co-sureties were discharged. Woods, J., says:

This view of the principal contention in the case at bar is in perfect harmony with the spirit and reason of the overwhelming current of adjudicated cases in

the State and federal courts in this country. In some the facts are strikingly similar to the case before us; in more—in nearly all — the spirit and reason of the decisions are the same. We content ourselves with citing a few out of the great number examined. See Smith v. U. S., 2 Wall. 219; Smith v. Weld, 2 Penn. St. 54; Dickerman v. Miner, 43 Iowa, 508; State v. Craig, 58 *Id.* 238; State v. McGonigle, 101 Mo. 358; State v. Churchill, 48 Ark. 426; Bank v. Sears, 4 Gray, 95; Commissioners v. Daum, 80 Ky. 388; Graves v. Tucker, 10 Smedes & M. 9; Nash v. Fugate, 24 Gratt. 202, 32 *Id.* 595; McCormick v. Bay City, 23 Mich. 457. The laborious research of the attorney-general of the State has produced many authorities bearing upon this particular subject, but a careful examination of them, with others unearthed in our own researches, produces the one solitary disagreeing view of the law. That is the case of Railroad v. Kitchin, 91 N. C. 39. The learned counsel concedes with caution that the court, in this opinion, goes too far in holding a surety liable who would seem to have been not liable, by the universal juridical judgment, outside of the State last referred to. The Kitchin Case is in violent conflict with the views herein advanced, and in irreconcilable antagonism to the long line of authorities hereinbefore noted. The doctrine of the Kitchin Case has been well declared by another court of last resort, in commenting on it, to be unsupported by precedent and wanting in that strength of argument which gives power to the general rule.

CRIMINAL LAW — FALSE PRETENSES—INSOLVENT BANK.— In Commonwealth v. Schwartz, the Court of Appeals of Kentucky decide that a banker who, after collecting money for a customer, induces the customer, while it is still in his possession, to loan it to the bank, by falsely pretending that the bank is solvent, when he knows or has reason to believe that it is not, is guilty of "obtaining" money under false pretenses within the meaning of the statute, since it is only in cases where the delivery of property is necessary in order to deprive the owner of it, that the false pretense must relate to such delivery. Bennett, J., says:

Article 13, § 2, ch. 29, Gen. St., provides: "If any person, by false pretense, statement, or token, with intent to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny," etc., he "shall be confined in the penitentiary," etc. If the appellee was enabled to borrow said money from Mrs. Buchholtz by falsely pretending that his bank was solvent, when he knew or had reason to believe that it was not, is he guilty of the crime denounced by the statute, *supra*? Upon that subject the rule is well settled that if a person obtained a loan of money from another by a false pretense of an existing fact, although he intended to pay it, he is guilty of the crime of obtaining money by false pretenses. See 7 Amer. & Eng. Enc. Law, pp. 752, 753, and notes; also, upon the subject that false pretense must be of an existing fact, see Glackan v. Com., 3 Metc. (Ky.) 232. The false pretense of an existing fact in this case, if any false pretense there was, consists in the false representation that the appellee's bank was solvent and the loan was safe, when he knew or had reason to believe that it was insolvent and unable to pay, and which induced her to make the loan, or induced her to loan the money, by the false pretense that he had a safe place to invest it, upon which she would realize 6 per cent., intending at the time to appropriate the money to his use, to-wit, that of the bank, knowing or having reason to believe that the bank was insolvent, although he intended to repay her. Such false pretenses, if made as indicated, were sufficient to authorize the case to go to the jury.

But it is contended that, as the appellee, at the time he obtained the loan of the money, had it in his possession, the statutory offense of obtaining money by false pretenses was not made out, because under the statute the offense is not made out unless both possession and title are obtained by the false pretense, and, as the appellee did not obtain the possession by the false pretense, the offense was not made out. The counsel for the appellee refer to many cases that sustain that proposition, and we concur with the general principle therein announced. But we think that principle does not apply to this case, for that principle only applies where it takes the delivery of the possession to complete the transfer of the title to the property. The statute reads, "obtain from another money or property." So, according to all the authorities, if it takes the delivery of the property to deprive the owner of dominion over it, the defendant must have obtained the delivery, as well as the title, before he can be made liable under the statute, *supra*. Mr. Wharton, in the second volume of his work on Criminal Law (9th Ed. § 1227), correctly sums up the meaning of all the cases on the subject in the following language: "A delivery of the property must be averred as the result of false pretenses in all cases in which the prosecution rests upon such delivery." Of course, as said, if the delivery is necessary to complete the transfer of the property, the prosecution in that case rests upon such delivery. To illustrate the rule, suppose A, by false pretenses, buys a horse from B, but B does not deliver the horse to A. In such case it cannot be said that A has, in the sense of the statute, obtained B's property by false pretenses, because as yet B has the property. He has not parted with it, and by reason of the fraud he is not bound to part with it. It is in legal contemplation, still his. Hence, he has not parted with his property by the false pretenses of A. But if the property is so situated that B, by transferring it, deprives himself of dominion over it without a delivery, which completes the transfer to A, and such transfer is obtained by false pretenses, there is an offense against the statute. The rule is illustrated by the following authorities: Bishop (2 Crim. Law, 7th Ed., § 465) says: "If after goods are delivered, the vendor becomes suspicious of the solvency of the purchaser, and expresses his intention to retain them, whereupon the latter, by false pretenses, induced him to relinquish his purpose, there is no offense against the statute, the sale having been completed before the false pretenses were made; and, though the right of stoppage *in transitu* may remain, the rule appears to be the same, the relinquishment of right not being deemed a parting with the goods. But where the sale is on condition subsequent, and a delivery thereupon, and afterwards the vendor is induced by false pretenses to give up his property in the goods, this is probably within the statute." In the case of People v. Haynes, 11 Wend. 557, it was held by the supreme court that where goods were delivered to a person, but the title did not pass to him except upon condition, and after the delivery the pur-

chaser obtained the title by false pretenses, he was guilty of obtaining the goods by false pretenses. Upon appeal to the court of appeals that court approved of the principle announced, but reversed the case on the ground that the sale was absolute. In the case of Commonwealth v. Hutchinson, 114 Mass. 327, it was held, under a statute that provided if any person obtained by false pretenses the signature of another to a writing that would be forgery at common law, he should be punished, etc.; that if it was necessary that the writing should be delivered in order to complete the crime of forgery, and it was not delivered, an offense against the statute was not made out, but if the instrument was obligatory upon the signer without delivery the offense against the statute was made out. In the case of Com. v. Devlin, 141 Mass. 423, 6 N. E. Rep. 64, it was held that on the delivery of sheep to a purchaser, the title not passing until the sheep were paid for, where the purchaser obtained the title by false pretenses, he was guilty, etc. These cases establish the doctrine that it is only in case the delivery of the property is necessary in order to completely deprive the owner of it that the false pretense must relate to such delivery, but if the delivery is not necessary to complete transfer the false pretenses need not relate to the delivery in order to make out the offense against the statute; and if the possession has been delivered to the party, but not the right of property, and he, after such delivery, obtains the title by false pretenses, he is guilty, under the statute, of obtaining goods, etc., by false pretenses. In this case the appellee had collected the woman's money, as her collecting agent, and had the possession of it as such agent; and, when she demanded it, he, recognizing her right and the character of his possession, induced her to part with her title to him. In such case it is clear that the prosecution does not rest upon delivery, as there was a complete transfer of property without the delivery.

COUNTIES — LIABILITY FOR NEGLIGENCE — DEFECTIVE BRIDGE — RESPONDEAT SUPERIOR. —In Park v. Board of Commissioners, the Appellate Court of Indiana holds that a county is liable for the injuries sustained by a horse in falling through a bridge, over which it was being driven, where such bridge had been left unguarded by a contractor who was repairing it for the county. New, J., says:

The statute expressly places the duty of keeping bridges upon public highways in repair upon the the several boards of county commissioners, and provides them with ample means for performing that duty. Therefore it is that, under the rulings in this State, counties are held liable for injuries resulting from defective bridges. House v. Board, 60 Ind. 580; Board v. Emmerson, 95 Ind. 579; Abbett v. Board, 114 Ind. 61, 16 N. E. Rep. 127; Board v. Pearson, 120 Ind. 426, 22 N. E. Rep. 134; Harris v. Board, 121 Ind. 299, 23 N. E. Rep. 92; Board v. Sisson, 2 Ind. App.—, 28 N. E. Rep. 374. It is also well settled that a traveler upon a street or county public highway, without knowledge of defects in bridges forming parts thereof, and using proper diligence himself, has a right to presume that they are in a safe condition, and to act upon that presumption. Board v. Legg, 110 Ind. 479, 11 N. E. Rep. 612. Is the county liable to the appellants upon the facts stated in the complaint? It may be stated, as a general rule or proposition, that where the injured party attempts to recover for his loss or injuries, against any other than him who is actually guilty of the wrongful act, it can only be on the ground that the relation of principal and agent or master and servant exists; and that, where the injury is done by a party exercising an independent employment, the person employing him is not liable. Ryan v. Curran, 64 Ind. 345; Sessengut v. Posey, 67 Ind. 408; City of Logansport v. Dick, 70 Ind. 65; Hilliard v. Richardson, 3 Gray. 349; Linton v. Smith, 8 Gray, 147; Conners v. Hennessey, 112 Mass. 96; Clark v. Fry, 8 Ohio St. 358; Pfau v. Williamson, 63 Ill. 16; De Forrest v. Wright, 2 Mich. 368; Wray v. Evans, 80 Pa. St. 102; Allen v. Willard, 57 Pa. St. 374; McCaffery v. Railroad Co., 61 N. Y. 178; Hexamer v. Webb, 101 N. Y. 377, 4 N. E. Rep. 755; 1 Shear. & R. Neg. §§ 168-273; Cooley, Torts, 646; Whart. Neg. § 818; 2 Dill. Mun. Corp. § 1028. The general rule, as we have stated it, however, has well-established exceptions. The rule as given will not apply where the work contracted for would be a nuisance or unlawful, nor where the contract directly requires the performance of work intrinsically dangerous, however, skillfully performed. Where the particular thing which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor, and authorizes him to do those acts, is equally liable to the injured party. In such cases the negligence is not that of the contractor alone; it is that of the employer also, in directing him, by the terms of the contract, to do an act which in its nature was wrongful; and in such cases the person injured may sue either or both. Neither can any one escape from the burden of an obligation imposed upon him by law by engaging for its performance by a contractor. Whatever he is bound to do must be done, and, though he may have a remedy against his contractor for the failure of the latter to discharge his duty, strangers to the contract are still at liberty to enforce the rights conferred upon them by the law, without noticing the contract. Thus it is now the firmly established doctrine in this country that the duty of maintaining streets in towns and cities in a safe condition for public use and travel rests primarily, as respects the public, upon the municipal corporation to which they belong, and the obligation to discharge that duty cannot by the corporation be evaded, superseded, or cast upon others by any act of its own. If such municipal corporation should so contract for work upon its streets that the doing of the work as contracted for would necessarily constitute an obstruction or defect in the street of such a nature as to render it unsafe or dangerous for the purpose of public travel unless properly guarded or protected, the employer, equally with the contractor, where injury results directly from the acts which the contractor engaged to perform, would be liable therefor to the injured party. 2 Dill. Mun. Corp. §§ 1018, 1027-1030, 1037; Shear. & R. Neg. §§ 176, 297, 298; Robbins v. City of Chicago, 4 Wall. 657; Water Co. v. Ware, 16 Wall. 566. In City of Logansport v. Dick, 70 Ind. 65, it was held that the city could not, by any contract it might make, avoid its liability to third persons for injury or death resulting from a breach of its duty in the care and control of its streets. See, also, Grove v. City of Fort Wayne, 45 Ind. 428; Town of Centerville v. Woods, 57 Ind. 192; City of Crawfordsville v. Smith, 79 Ind. 308; Turner v. City of Indianapolis, 96 Ind. 51; Glantz v. City of South Bend, 106 Ind. 305, 6 N. E. Rep. 632.

It is clear, from the authorities cited, that the obligation of a town or city to keep its streets in a safe condition for the passage of persons and property is a primary one, and the municipality cannot divest itself of this duty. It is also well settled by the greater weight of authority that, because of this duty to the public, a city or town, when having work done upon its streets or bridges, although by a contractor, is bound to see that such precautions are used while the work is in progress as are reasonably necessary to protect travel. No matter what kind of contract the city may make, nor with whom, it still remains charged with the care and control of the street in which the improvement, change, or repair is being made, and it cannot throw off its duty, and the responsibilities through which that duty is to be enforced. 2 Dill. Mun. Corp. § 1027; Storrs v. City of Utica, 17 N. Y. 104; Brusso v. City of Buffalo, 90 N. Y. 679; Circleville v. Neuding, 41 Ohio St. 465; St. Paul v. Seitz, 3 Minn. 297 (Gil. 205); Brooks v. Inhabitants, 106 Mass. 271; Groves v. City of Rochester, 39 Hun, 5; Wilson v. City of Wheeling, 19 W. Va. 329; City of Jacksonville v. Drew, 19 Fla. 106; Dressell v. City of Kingston, 32 Hun, 533; Welsh v. City of St. Louis, 73 Mo. 71; Haxhurst v. Mayor, 43 Hun, 588; Russell v. Inhabitants, 74 Mo. 480. And in such cases notice to the municipality of the absence of proper precautions or guards would not be necessary. Brusso v. City of Buffalo, *supra;* Brooks v. Inhabitants, *supra;* Ironton v. Kelley, 38 Ohio St. 50; Groves v. City of Rochester, *supra;* Board v. Pearson, 120 Ind. 426, 22 N. E. Rep. 134. The rules which we find thus laid down have no application, of course, where the legislature has placed duties of which we have spoken upon independent public agencies, to be exercised within the municipality, but independent of control by it. In such cases the agencies or officers so created and empowered are so far independent of the corporation that they are deemed public officers, and it is not chargeable with their action or negligence in the performance of the duties vested in them. Groves v. City of Rochester, *supra;* People v. Walsh, 96 Ill. 232; Maxmilian v. Mayor, 62 N. Y. 160; Tone v. Mayor, 70 N. Y. 158; Ham v. Mayor, *Id.* 459; Smith v. City of Rochester, 76 N. Y. 506; Bigler v. Mayor, 5 Abb. N. C. 51; Bamber v. City of Rochester, 26 Hun, 587; 2 Dill. Mun. Corp. § 974; Abbett v. Board, 114 Ind. 61, 16 N. E. Rep. 127; Union Civil Tp. v. Berryman (Ind. App.), 28 N. E. Rep. 774. We can see no reason why the principles and obligations which we have found to be so firmly placed upon towns and cities as to streets and bridges within their limits do not rest with like force and weight upon counties as to bridges constituting parts of public highways within the boundaries of the counties. An examination of the many cases decided by the supreme court of this State, as also by the courts of last resort in other States, will show that, in cases where the liability of counties because of failure to repair bridges was involved, decisions affecting towns and cities as well as counties are cited and relied on without distinction. The case of House v. Board, 60 Ind. 580, was an action by the appellant to recover damages for alleged negligence on the part of the appellee (the county) in suffering one of the bridges of the county to become out of repair, etc. It was contended by counsel for the appellee that a county stood upon different ground in respect to liability than that occupied by a city. The court held otherwise.

THE REMEDIES OF AN EXECUTOR AND OF A CREDITOR AGAINST AN ESTATE FOR NECESSARIES FURNISHED AFTER THE DEATH OF THE TESTATOR.

The rule of law may be regarded as settled that an executor cannot contract a debt without license and make it a lien upon or bind the estate for its payment.[1] The reasons for the rule are that an executor's duties and powers are to use and disburse funds as provided by law, and not to make executory contracts; that there is no consideration for an executory contract moving between the estate and the promisee; and that a recognition of any other rule would be mischievous in its results. Any contract which an executor may make even for the benefit of the estate legally binds himself and not the estate.[2] While he thus makes himself liable for necessaries relating to an estate, he is presumed to have sufficient assets in his hands to satisfy such debts, and may be reimbursed out of such assets, if the payment thereof does not defeat the payment of debts existing at the time of the death of the testator.[3] An executor although named in a will is controlled by statutory laws. His powers and duties in the management and distribution of the estate are defined and limited by such laws, subject to the approval of probate court. In the management of estates and in the execution of trusts, special cases arise where special proceedings become necessary to aid and protect such executor, or a creditor of such estate. It is interesting to consider these exceptions:

First. When a testator directs his estate to be kept intact and to be distributed to legatees at their majority, and its income is insufficient for their support, where and what is the remedy?

Second. When a creditor furnishes necessaries to such legatee and to such estate at the request of the executor and guardian, who

[1] Austin v. Munro, 47 N. Y. 360; James' Appeal, 89 Pa. St. 54; Ten Eyck v. Vanderpool, 8 Johns. 120; Curtis v. Bank, 39 Ohio St. 579.

[2] Bank v. Weeks, 53 Vt. 115; Powers v. Douglass, 53 Vt. 471; Luscomb v. Ballard, 5 Gray, 405; Davis v. French, 20 Me. 21; Baker v. Moor, 63 Me. 443; Prentice v. Dehon, 10 Allen, 109.

[3] Peter v. Beverly, 10 Pet. 566; Woods v. Ridley, 27 Miss. 119; Schouler's Ex'rs. § 256.

had no special authority to contract such debt, where and what is the remedy?

First. Not unfrequently a testator confines or limits the use of the estate, and directs its distribution to certain heirs or legatees when they reach majority. The executor or guardian finds that the income is insufficient to care for, support and educate such legatees. Their needs from accident or sickness are urgent and imperative. Unless the fund devised to them at majority can be reached and used, such legatees may for a time become objects of charity or a public charge. The executor or guardian has no authority to make advances out of this fund, as devised to them.

The probate court has no power or jurisdiction to give relief.[4] Its jurisdiction is limited to the protection and management of such estates as governed by law; to the allowance of proper debts of the decedent, existing at his death, and of ordinary expenses of administration; and to its distribution, as provided by law, or directed by will. This court has no power to make an order authorizing the present use of a fund directed to be kept intact and paid in the future.[5]

But a court of equity has power to grant relief, and to authorize the executor or guardian to make advances for necessaries, and to direct the payment thereof out of a fund bequeathed to legatees at majority.[6] In the decree, the court will specify the amount and manner of payments. The exercise of this power is one of the special functions of a court of equity. It is to give relief where there is no adequate remedy at law. In *Re* Bostwick, the income of a fund was insufficient to provide for the immediate needs of an infant legatee. Application was made to a court of equity. Upon a hearing authority was given to the guardian to use such funds for the payment of past advances and of future advances. The right of the court to exercise this authority was based upon the ground that the supervision and control of trusts, estates and beneficiary interests are the special powers belonging to a court of equity. The reason which has been generally accepted for the exercise of this case was upon the ground that the expenditure of a portion or the whole of such fund to provide for such infant at that time, was more important and beneficial than that it should be kept intact and paid to him at a time when he would be able to care for himself. The English authorities on this question in this case were cited and criticised. In Knorr v. Millard, this same question was raised upon the application of the guardian of infant legatees to appropriate the income from a trust fund directed to be set apart, accumulated and paid to certain legatees at majority. The court of equity decreed that the executor pay a certain annual sum of the income of such trust to the guardian of the infant legatees. On appeal the supreme court said: that "the power has been recognized in the court of equity in its administration of trusts, to provide for making necessary advances out of the income when infants are likely otherwise to suffer, even where by the terms of the trust itself an accumulation is contemplated."

Whenever an occasion of this kind arises the executor or guardian should apply to the court of equity for a decree authorizing him to make advances out of such fund. This will protect him against any contest or objection to his account when he asks for the allowance of such items. But a guardian may make advances for necessaries for support and maintenance of his wards, without first obtaining leave of the court, and the court will allow the same in the account of the guardian. The principle governing the action of the guardian in such cases is restricted to necessaries; that is, if the past advances are for necesssaries, and the guardian would have received authority, if asked, then the court will ratify, and confirm such advances, when expended without such authority.[7]

[4] Knorr v. Millard, 52 Mich. 542; Reinhart v. Gartrell, 33 Ala. 726; McKinney v. Curtis, 60 Mich. 611; Moulton v. Smith, 16 R. I. 126, 12 Atl. Rep. 891; Perry on Trusts, § 615; Abbott v. Foote, 146 Mass. 333.

[5] Morford v. Dieffenbocker, 54 Mich. 605; Ireland v. Miller, 71 Mich. 119; Moulton v. Smith, 16 R. I. 126, 12 Atl. Rep. 891.

[6] Knorr v. Millard, 57 Mich. 265; *In re* Bostwick, 4 Johns. Ch. 105; Perry on Trusts, § 615.

[7] Perry on Trusts, § 615; McPherson on Infants, 285; Waldrip v. Tulley, 48 Ark. 297; Campbell v. Golden, 79 Ky. 544; Barton v. Bowen, 27 Gratt. (Va.) 849; Owens v. Pearce, 10 Lea (Tenn.), 45; Hobbs v. Harlan, 10 Lea (Tenn.), 268; Dowling v. Teeley, 72 Ga. 557; Cummins v. Cummins, 29 Ill. 452; Wright v. Comely, 14 Ill. App. 551; Smith's Appeal, 30 Pa. St. 397; Kilpatrick's Appeal, 113 Pa. St. 46; Brown's Appeal, 5 Atl. Rep. 14; Bond v. Lockwood, 33 Ill. 212; Dorney v. Bullock, 7 Ired. Eq. 102; Roseborough v. Roseborough, 3 Baxt. 316; *In re* Wright, 4 N. Y. St.

Incidentally to this question, when an executor or guardian makes advances for the benefit of the estate after the death of the testator, they may be allowed, if reasonable in his accounting with the estate, when such estate is solvent.[8] The right to allow such advances is based upon general equitable principles.[9] Such is the rule stated in Hyland v. Baxter. But in that case the surrogate court followed the English rule and refused to allow them, and the decision was affirmed on the ground of *res judicata*. The court of appeals expressed their disapprobation in strong language against the inequity of the ruling and hoped that the court below would find some way of relief. When such expenses have been paid and allowed by the probate court, the court of equity will protect such executor in such payment and allowance if it is questioned.[10] If they have not been presented for allowance in the probate court, the court of equity will allow them and enforce their payment as an equitable lien on such estate, when such court has been invoked for an accounting and for partition of the estate by other legatees.[11] Whatever has been said in relation to executors and legatees would apply to administrators and infant heirs whenever similar questions arise.

Second. When a creditor makes advances or furnishes necessaries for the benefit of an estate or for infant legatees (or both), at the request of an executor, his remedy is one at law against such executor.[12] This legal remedy is put upon the ground that, as an executor cannot create a liability against an estate upon an executory contract, there can be no judgment against such estate by such creditor for his debt.[13]

But when a creditor furnishes necessaries for such estate and legatees in good faith and at the request of such executor or guardian, and there are abundant assets of the estate, and the executor or guardian refuses to pay and ask for their allowance in his account and is personally irresponsible, is such creditor remediless? The payment of such debt is right. The necessaries furnished were reasonable and the estate and legatees received a substantial benefit therefrom. To deny or refuse its payment works an injury. To say that there is no remedy presents a weakness in the administration of justice which needs legislation or correction. He has an action against the executor. Has he no other? If he puts his debt into a judgment against the executor, he makes it a personal debt against him and releases the estate from any claim or action against it. He may have had another action, in a proper forum against such estate, but when he puts it into a judgment against such executor, he makes an election of remedies and is bound by it.[14]

The executor is irresponsible, and a judgment against him worthless. If he has no other redress his debt is lost. To limit such creditor to an action at law is legal, but it is not equity. It is not honest for an estate or for infant legatees who have received benefit from such creditor to avoid a liability or refuse payment because the executor or guardian could not bind them or the estate by his executory agreements. To laugh at such creditor behind a legal principle is akin to torturing a defenseless man. The result of such a posi-

343; Remington v. Field, 16 R. I. 509; *In re* Besondy, 32 Minn. 385, 50 Am. Rep. 579; Smack v. Duncan, 4 Sand. Ch. 617; Villard v. Roberts, 49 Am. Dec. 657; Cheeney v. Roodhouse, 134 Ill. 422. In *Re* Besondy the rule is stated: It is well settled that a guardian, or any one in possession of the infant's property, or a stranger may maintain him, and be allowed therefor such sum as can be shown to be reasonable and proper, citing Bond v. Lockwood. The law also shows special favor to the mother, and her application for past maintenance will be granted in cases where the father would be refused. In Gott v. Culp, 45 Mich. 265, Justice Campbell says: "A guardian whose ward's estate is sufficient to furnish an income that will with economy maintain and educate her suitably, should not exceed it without adequate reason. But in this country, while it is prudent to obtain leave in advance, it is not necessary if circumstances justify the excess." This doctrine was cited and approved in Chubb v. Bradley, 58 Mich. 268; *In re* Ward, 73 Mich. 220, 41 N. W. Rep. 431.

[8] Zoellner v. Zoellner, 53 Mich. 620; Schouler's Ex'rs. § 256; Woods v. Ridley, 27 Miss. 119; Hyland v. Baxter, 98 N. Y. 611; Bradley v. Bradley, 1 S. E. Rep. 477.

[9] Hyland v. Baxter, 98 N. Y. 611.

[10] Church v. Holcomb, 45 Mich. 29. In this case the supreme court say that a court in equity would have been the proper tribunal for relief if objection had been made to its allowance. As none was made, it would protect such executrix when the account is attacked collaterally, even if the power of the probate court is doubted.

[11] Zoellner v. Zoellner, 53 Mich. 620; Peter v. Beverly, 10 Pet. 566.

[12] Baker v. Moor, 63 Me. 443; Schouler's Ex'rs, § 256.

[13] Davis v. French, 20 Me, 51; Barry v. Rusk, 1 T. R. 691; Wait v. Holt, 58 N. H. 467.

[14] Alterauge v. Christiansen, 48 Mich. 60.

tion is to say that the law is powerless to give a remedy when a right is established.

It is a legal paradox to assert that a legal right to something exists or is admitted, and yet that a deprivation of it is not wrong. In judicial proceedings and development the law has a twofold object: to recognize a right and to provide a remedy. When the right is admitted, the remedy must follow as a matter of course. The remedy is the legal conclusion. If there is no precedent, when the facts are found in favor of a party, the duty of the court is to map out a remedy.[15] Such was the conclusion in Ashby v. White, in which Lord Holt said: "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."

For every right there is a remedy. It cannot be destroyed or denied. The legislature has a right to limit the time in which to enforce the right. This is on the ground of public policy. But it cannot destroy nor cut off the right.[16]

If the party who has a right is not able to find an adequate remedy in an action at law, the court of equity will give to him relief.[17] This is the fundamental principle upon which this court was created, and upon which it still assumes to exercise power. If there are assets of an estate, a creditor who has furnished necessaries for it at the request of an executor, has a remedy against such estate in a court of equity.[18] Equity will give him relief because he has no other adequate remedy. To prevent fraud and to do justice equity will engraft an equitable lien on real estate, and decree a sale to satisfy such lien.[19] It will protect a party who loaned money to an executrix upon license of the probate court to mortgage real estate to pay debts of the decedent and advances by her for the benefit of the estate. When the validity of such mortgage, on its foreclosure, is attacked by the legatees on the ground of fraud and void proceedings, the court said that the mortgagee had a right to a decree for an equitable lien.[20] It did so on general equitable principles. In Darrah v. Boyce, where a bill was filed for an acccounting and the defense was an action at law the court said: "that the form of action should not be made to depend entirely on the fact that the complainant had a remedy at law, but whether or not such action is adequate and will do full justice to the parties, the forum should be allowed and adopted which will best accomplish the ends of justice." A court of equity will not permit an honest creditor to lose a debt because he has an action at law. It will not send him into a forum to experiment upon the result when it can give full relief.[21] The necessity for a remedy to a creditor for necessaries furnished to an estate by the request of the executor seldom arises because such creditor is usually paid, and when paid, such claim is embodied in the executor's account. But when it is not paid, such creditor may invoke the power of the court of equity for relief for the payment of debt made in good

[15] Ashby v. White, 1 Smith Leading Cases, 105; Snow v. Cowles, 22 N. H. 296; Toothaker v. Winslow, 61 Me. 129.

[16] Lorman v. Benson, 8 Mich. 18; Price v. Hopkins, 13 Mich. 318, authorities cited.

[17] Wright v. Wright, 64 Ala. 88; Smith v. Hoskins' Heirs, 7 J. J. Marsh, 502; Case v. Beauregard, 101 U. S. 688; Thompson v. Smith, 64 N. H. 212, 13 Atl. Rep. 639; Rogers v. Traphagen, 11 Atl. Rep. 336; Bradley v. Bradley, 1 S. E. Rep. 477; Beverley v. Rhodes, 10 S. E. Rep. 572; *In re* Moore, 13 Pac. Rep. 880; Moulton v. Smith, 16 R. I. 126, 12 Atl. Rep. 891; Conger v. Atwood, 28 Ohio St. 184; Peter v. Beverly, 10 Pet. 566; Kennedy v. Cresswell, 101 U. S. 641.

[18] Steel v. McDowell, 9 M. & S. 193; Wall v. Kellogg's Ex'rs, 16 N. Y. 385; De Valengin's Adm'r v. Duffy, 14 Pet. 290; Ashby v. Ashby's Ex'rs, 7 Barn. & Cress. 444; Arbuckle v. Tracy, 15 Ohio, 432; Fitzhugh's Ex'rs v. Fitzhugh, 11 Gratt. 300, 62 Am. Dec. 653. In Peter v. Beverly it is held that if an executor pay a debt out of his own funds, he becomes a creditor of the estate and may resort to the trust fund to pay his debt. A third party who, through the executor pays a debt of the estate is equally the creditor of the estate. In Wall v. Kellogg's Ex'rs it is said: "The estate having received the benefit of the purchase money of the sale of lands upon which the plaintiff had a lien, it is equitably chargeable with the sum paid by the plaintiff prior to such sale to protect his interest in the premises." The same doctrine was announced in Ashby v. Ashby, because the executor in his individual capacity was insolvent. In Conger, Adm'r v. Atwood, it was held that a creditor cannot be defeated from a recovery in an action against the executor in his representative capacity and the heirs of such estate, on the ground that he is personally liable therefor, especially when the estate received the benefit of the money to which such creditor was entitled; affirming the doctrine in Arbuckle v. Tracy, that when the estate received the benefit it is equitably chargeable therewith.

[19] Kelley v. Kelley, 54 Mich. 47; Case v. Beauregard, 101 U. S. 688; Osgood v. Osgood, 44 N. W. Rep. 325.

[20] Church v. Holcomb, 45 Mich. 29.

[21] Wilmarth v. Woodcock, 58 Mich. 482; McKinney v. Curtis, 60 Mich. 611; Moulton v. Smith, 12 Atl. Rep. 891; Turner v. Adams, 46 Mo. 95; Darrah v. Boyce, 62 Mich. 480; Pomeroy's Eq. Jur. §§ 279, 313, 1153.

faith, when the estate is solvent, and obtain satisfaction.

In the State of Ohio where the code prevails, the creditor would have a right to maintain a civil action, and the court will give him relief, because the estate having received the benefit must satisfy such claims, because the distinction between actions at law and in equity is not recognized, and because the courts under a code practice enforce equitable rights in a civil action.[22] This same practice is undoubtedly recognized in all other States having a code practice.

There are two recent cases where this question of remedy to a creditor is raised and decided.[23] In Thompson v. Smith the creditor expended a large sum of money for the estate at the request of a former executor who was personally insolvent. There were sufficient assets of the estate to pay his debt. He filed a bill in equity and the court gave him relief, holding that although he could not recover in an action at law, as the executor could not bind the estate by his executory contract, yet equity would not leave him remediless. He had no other adequate remedy. In Moulton v. Smith, the court sustained the bill in equity by an administrator to establish a lien against an estate for expenses incurred and paid, and services rendered for it by his intestate. The defense was a remedy at law. The court held that it was a proper case for equity to retain and protect.

It has been held that an executor could borrow money for the benefit of an estate and pledge the stocks of such estate as security.[24] Even if the probate court may have jurisdiction to hear and allow claims of this character, it would require other proceedings to enforce the payment. When the court of equity assumes jurisdiction, it has full power to determine all the questions in dispute, and not only to allow but to enforce payment of the debt by a sale of the estate.[25] A multiplicity of suits is thereby avoided.

Of course the right of a creditor to ask a court of equity to give him a relief is limited to necessaries, and such as are reasonable for that particular estate. The solvency of the estate, the irresponsibility of the executor, and the good faith of the creditor besides the reasonableness of the actual necessaries must all be established, before the court of equity will give relief. It will never lend its power to reimburse a negligent or reckless use of funds, or to pay an unjust or useless claim, or to defeat the interested parties out of their full share of the estate.[26] In all such cases equity will leave parties to their legal remedy. If they lose by or fail in such action it is the result of their imprudence or carelessness, and they must abide by it. The rights of heirs and legatees are too sacred to be subject to any other rule. In this there is safety, and in no other; otherwise estates would be the prey of corrupt men, and of fraudulent schemes without limit or comprehension. The parties to any such action of a creditor would be the administrator, heirs and legatees of such estate.[27]

[22] Conger, Adm'r v. Atwood, 28 Ohio St. 134.

[23] Thompson v. Smith, 64 N. H. 412, 13 Atl. Rep. 639; Moulton v. Smith, 16 R. I. 126, 12 Atl. Rep. 891.

[24] Carter v. Beach, 71 Me. 488; Dunne v. Dury, 40 Iowa, 251.

[25] Burckhardt v. Burckhardt, 36 Ohio St. 261, 42 Ohio St. 474; Moulton v. Smith, 16 R. I. 126, 12 Atl. Rep. 891; McKinney v. Curtis, 60 Mich. 611; Beverly v. Rhodes (Va.), 10 S. E. Rep. 572, authorities cited.

[26] Lucht v. Behrens, 28 Ohio St. 240; Curtis v. Bank, 39 Ohio St. 579.

[27] Conger, Adm'r v. Atwood, 28 Ohio St. 134; Knorr v. Millard, 57 Mich. 265.

TRESPASS—DAMAGES—FRUIT TREES.

DWIGHT V. ELMIRA, C. & N. R. CO.

Court of Appeals of New York, Second Division, March 15, 1892.

The proper measure of damages in an action for the destruction of fruit trees is the difference between the value of the realty before and after the injury.

PARKER, J.: The judgment awards to the plaintiff $503 for damages occasioned by the defendant's negligence in setting on fire and destroying 21 apple-trees, 2 cherry-trees, and 2½ tons of standing grass, and also injuring 7 apple-trees, the property of plaintiff. The only question presented on this appeal is whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: "Question. What were those twenty-one trees worth at the time they were killed?" Objection was made that the evidence did not tend to prove the proper measure of damages, but the objection was overruled, and the answer was: "Answer. I should say they were worth fifty dollars a piece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken. Testimony was also given, tending to prove that the land burned over by the fire was depreciated

in value $30 per acre. The only evidence offered by the plaintiff, touching the question of damages, was of the character already alluded to.

Fruit-trees, like those which are the subject of this controversy, have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose; but, while connected with the land, they have a producing capacity which adds to the value of the realty. Necessarily the testimony adduced tended to show, not the value of the trees severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit. How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions and attempted to be secured by the answers. Can the owner of an injured freehold, because the trees taken are destroyed happen to be fruit instead of timber trees, have his damages measured in that manner? is the question presented now, for the first time, in this court, so far as we have observed. The learned referee followed the decision in Whitbeck v. Railroad Co., 36 Barb. 644, in which the proposition is asserted that, while fruit-trees form a part of the land, the true rule is that if the thing destroyed has a value which can be accurately measured without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. The court cited no authority for the conclusion reached, and our attention has not been called to any prior decision justifying its position. Nor has the Whitbeck Case been approved in this court, although cited and distinguished in Argotsinger v. Vines, 82 N. Y. 309. While the rule is, undoubtedly, as stated by the learned judge in the Whitbeck Case, that a recovery may be had for the value of the thing destroyed, where it has a value which may be accurately measured without reference to the soil in which it stands, he apparently overlooked the fact that fruit-trees do not have such a value; and the rule was, therefore, as we think, wrongly applied. Cases are not wanting to illustrate a proper application of that rule. Where timber forming part of a forest is fully grown, the value of the trees taken or destroyed can be recovered. In nearly all jurisdictions, this is all that may be recovered; and the reason assigned for it is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. 3 Suth. Dam. p. 374; 3 Sedg. Dam. (8th Ed.) p. 45; Single v. Schneider, 30 Wis. 570; Webster v. Moe, 35 Wis. 75; Webber v. Quaw, 46 Wis. 118, 49 N. W. Rep. 830; Haseltine v. Mosher, 51 Wis. 443, 8 N. W. Rep. 273; Tuttle v. Wilson, 52 Wis. 643, 9 N. W. Rep. 822; Wooden-Ware Co. v. U. S. 106 U. S. 432, 1 Sup. Ct. Rep. 398; Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. Rep. 392; Ward v. Railroad Co., 13 Nev. 44; Tilden v. Johnson, 52 Vt. 628; Adams v. Blodgett, 47 N. H. 219; Cushing v. Longfellow, 26 Me. 306. In this State it is settled that even where full-grown timber is cut or destroyed the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of. Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 N. Y. 36; Easterbrook v. Railroad Co., 51 Barb. 94. The rule is also applicable to nursery trees grown for market, because they have a value for transplanting. The soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages. 3 Sedg. Dam. (8th Ed.) p. 48; Birket v. Williams, 30 Ill. App. 451. Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages, where it has a value after removal, and the land has sustained no injury because of it. 3 Sedg. Dam. (8th Ed.) p. 48; 3 Suth. Dam. p. 374; 5 Amer. & Eng. Enc. Law, p. 36, note 2; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Coal Co. v. Rogers, 108 Pa. St. 147-152; Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. Rep. 444; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, 479-488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell, 3 Q. B. 278; Martin v. Porter, 5 Mees & W. 351. On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land. This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibberd, 6 Cal. 163; Wallace v. Goodall, 18 N. H. 439-456; Hayes v. Railroad Co., 45 Minn. 17-20, 47 N. W. Rep. 260. In Wallace's Case, *supra*, the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil." The same rule prevails as to shade-trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell (Sup.), 5 N. Y. Supp. 248, and cases cited *supra*. The current

of authority is to the effect that fruit-trees and ornamental or growing trees are subject to the same rule. Montgomery v. Locke, 72 Cal. 75, 13 Pac. Rep. 401; Mitchell v. Billingsley, 17 Ala. 391-393; Wallace v. Goodall, 18 N. H. 439-456; 3 Sedg. Dam. (8th Ed.) § 933.

It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. Ensley v. Mayor, 2 Baxt. 144; Striegal v. Moore, 55 Iowa, 88, 7 N. W. Rep. 413; Longfellow v. Quimby, 33 Me. 457; Foote v. Merrill, 54 N. H. 490. A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury. In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed, after separation from the realty, of which they formed apart,—as indeed he should not have been, as such value was little or nothing,—so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value. This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury; and as this rule was not followed, but rejected, on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed. All concur, except Bradley, Brown, and Landon, JJ., dissenting.

NOTE.—Upon the proposition that in an action of trespass for cutting and carrying away trees, if the trees were full grown timber trees, the measure of damages is the value of the trees, see, in addition to the cases cited in the principal opinion, Michigan L. & I. Co. v. Deer Lake Co., 60 Mich. 143; Miller v. Wellman, 75 Mich. 353; Carner v. Chicago, etc. Ry. Co., 43 Minn. 375; Bennett v. Thompson, 13 Ired. 146; Cox v. England, 65 Pa. St. 212; Cotter v. Plumer, 72 Wis. 476; St. Croix Land & Lumber Co. v. Ritchie (Wis.), 47 N. W. Rep. 657.

As to the rule that the damage to the realty may properly be taken by the jury as their guide, see Kinsly v. Hire (App. Ct. Ind.), 28 N. E. Rep. 194; Hoyt v. South. N. Eng. Tel. Co., 60 Conn. 385, 22 Atl. Rep. 957.

The citations in the principal opinion are so abundant as to make it superfluous to pursue the inquiry upon the points there presented any further. One of the collateral questions arising out of this topic affords matter of much interest. Following the rule that where the article severed from the freehold is a complete product which has reached its maturity, the measure of plaintiff's damage will be the value of such articles, an interesting question arises when, by the act of severance or by labor expended upon the article by the trespasser after its severance, its value is materially enhanced. Shall he recover the value of his property as it existed on the freehold, the value of the timber as it stood in the forest, or of the coal before it was mined? Or shall he have the value of the timber as cut into logs, or of the coal after it has been mined? And if the defendant has sawed the logs into boards, can the plaintiff claim the value of the boards as the measure of his injury? Upon this subject the cases are in conflict. The earlier English cases went upon the theory that when the article was severed from the realty and converted into a chattel, it instantly became the property of the owner of the fee, and his damages against one who had carried away that chattel was its value at the time of its conversion; that it would be improper, as qualifying his wrong, to allow the wrong-doer anything for the mischief he had done, or for the expense he had incurred in converting a tree or piece of rock into a chattel, which he had no business to do. Martin v. Porter, 5 M. & W. 352; Morgan v. Powell, 3 Q. B. 278. The rigor of this rule was modified by Mr. Baron Parke, at *nisi prius*, in Wood v. Morewood, 3 Q. B. 440, where he told the jury that if the defendant had acted innocently, and in good faith, without negligence, the plaintiff would be entitled only to the value of the article before it was disturbed in its place on the freehold.

Many of the American cases have adopted the rule of the common law. Illinois, etc. R. Co. v. Ogle, 82 Ill. 627; McClean C. C. Co. v. Lennon, 91 Ill. 561; McLean C. C. Co. v. Long, 81 Ill. 359; Cheeney v. Nebraska & C. S. Co., 41 Fed. Rep. 740; Franklin Coal Co. v. McMillan, 49 Md. 549; Blaen Avon C. Co. v. McCulloch, 59 Md. 403; Winchester v. Craig, 33 Mich. 205; Moody v. Whitney, 38 Me. 174; Beede v. Lamprey, 64 N. H. 510; Bly v. U. S., 4 Dill. 464; Firmin v. Firmin, 9 Hun, 571; Bennett v. Thompson, 13 Ired. L. 146; Smith v. Gonder, 22 Ga. 353; Ellis v. Wire, 33 Ind. 127. In some jurisdictions the rule varies with the form of the action. In trover the plaintiff is allowed the whole value of the property as increased by the defendant's labor. Omaha, etc. R. Co. v. Tabor, 13 Colo. 41; Skinner v. Pinney, 19 Fla. 42; Foote v. Merrill, 54 N. H. 490.

The leading American case, taking the view that now generally prevails, that the defendant, if he acted in good faith, ought to be allowed the value of his services, was Forsyth v. Wells, 41 Pa. St. 291, decided by the Supreme Court of Pennsylvania before the present rule was established in England. The doctrine of this case has been generally adopted. So, in actions for wrongfully mining coal or ore, the damage is the value of the coal or ore as it rested in the earth (Waters v. Stevenson, 13 Nev. 157; Coal Creek M. Co. v. Moses, 15 Lea, 300; Chamberlain v. Collinson, 45 Iowa, 429; Goller v. Fett, 30 Cal. 481; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80), and for cutting trees, the value of the standing timber. Foote v. Merrill, 54 N. H. 490; Whitney v. Huntington, 37 Minn. 197; Heard v. Jame, 49 Miss. 236; Tilden v. Johnson, 52 Vt. 628; Ross v. Scott, 15 Lea, 479; Whitbeck v. New York Cent. R. Co., 36 Barb. 644; Ayres v. Hubbard, 71 Mich. 594; King v. Merriman, 38 Minn. 47; Thompson v. Moiles, 46 Mich. 42; Gates v. Rifle Boom Co., 70 Mich. 309.

BOOK REVIEWS.

PLEADING AT COMMON LAW AND UNDER THE CODES.

This little monograph of little over one hundred pages is reprinted from the American and English Encyclopædia of Law, being the article on "Pleading," prepared for that work by Geo. Wharton Pepper, of the Philadelphia Bar, and lecturer on pleading in the Law School of the University of Pennsylvania. It has been reprinted in this form for the use of students. It seems to be a clear and concise presentation of a subject which the average student finds exceptionally difficult.

BOOKS RECEIVED.

CONTRACTUAL LIMITATIONS, including Trade Strikes and Conspiracies, and Corporate Trusts and Combinations. By Charles A. Ray, LL.D., of the New York Bar, ex-Chief Justice of the Supreme Court of Indiana. The Lawyers' Co-operative Publishing Company, Rochester, N. Y. 1892.

THE ANNUAL ON THE LAW OF REAL PROPERTY, being a Complete Compendium of Real Estate Law, Embracing: All Current Case Law, carefully Selected, thoroughly Annotated and accurately Epitomized; Comparative Statutory Construction of the Laws of the Several States, and Exhaustive Treatises upon the most Important Branches of the Law of Real Property. Edited by Tilghman E. Ballard and Emerson E. Ballard, Authors of "Ballards' Real Estate Statutes of Indiana," "Ballards' Real Estate Statutes of Kentucky," and Editors, with Mr. Thornton, of "Thornton & Ballards' Annotated Indiana Practice Code." Vol. 1. 1892. Crawfordsville, Ind.: Ballard & Ballard, 123½ Washington street.

THE ROMAN LAW OF TESTAMENTS, Codicils and Gifts in the Event of Death. Mortis Causa Donationes. By Moses A. Dropsie, Translator and Editor of Mackeldey's Handbook of the Roman Law. Philadelphia: T. & J. W. Johnson & Co. 1892.

THE LAW OF CONTRACTS in Restraint of Trade, with Special Reference to "Trusts." By George Stuart Patterson, Ph.B., LL.B., Member of the Philadelphia Bar, and Fellow in the Department of Law of the University of Pennsylvania. Philadelphia: University of Pennsylvania Press. 1891.

A TREATISE ON THE LAW Relating to the Office and Duties of Notaries Public throughout the United States. With Forms of Affidavits, Acknowledgments, Conveyances, Depositions, Protests and Legal Instruments. By John Proffatt, LL.B., Author of "Curiosities and Law of Wills," "A Treatise on Trial by Jury," etc. Second Edition by John F. Tyler and John J. Stephens, of the San Francisco Bar. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACTION BY ADMINISTRATOR—Caption of Complaint.—The words "as administrator," following the plaintiff's name in the caption of a complaint, are sufficient to show that plaintiff sues in a representative capacity, though no allegation with reference thereto is made in the complaint. The word "administrator," following alone the plaintiff's name in the caption, is a mere word of discription personal, but, if the body of the complaint following such a caption contains a sufficient statement to show that plaintiff sues in his representative capacity, the body of the complaint will govern the caption.—*Lucas v. Pittman*, Ala., 10 South. Rep. 603.

2. ADMINISTRATION—Allowance to Widow.—To justify the reversal of the opinion of the probate court fixing a family allowance, the appellant must show an erroneous ruling of such court, and not merely bad reasoning or mistaken views of the law. — *In re Kingsley's Estate*, Cal., 29 Pac. Rep. 244.

3. ADMINISTRATION—Appointment of Administrator.—Code Civil Proc. § 1365, provides that administration must be granted first to the surviving husband or wife, or some competent person whom he or she may request. Section 1369 provides that a non-resident is not competent to serve as administrator: *Held*, that a non-resident wife may select a competent person to administer. —*In re Dorris' Estate*, Cal., 29 Pac. Rep. 244.

4. APPEAL — Appellate Court. — A judgment of the Illinois appellate court, reversing the judgment of the trial court, without either remanding the cause for a new trial for error of law or reciting the facts as found by the appellate court, as required by Rev. St. 1891, ch. 110, § 88, when that court differs from the trial court in its findings of fact, is erroneous. — *Siddall v. Jansen*, Ill., 30 N. E. Rep. 357.

5. APPEAL—Assignment of Errors.— Where in an assignment of error the title of the cause shows that there are parties whose names are omitted entirely, and gives the initials only of others, and such omitted names do not appear in the body of the assignment, it cannot be considered, being in disregard of Sup. Ct. Rule 6, requiring that "the assignment of errors shall contain the full names of the parties."—*Brown v. Trexler*, Ind., 30 N. E. Rep. 418.

6. APPEAL — Decree — Accounting. — Where, in a suit against a defendant to enforce a resulting trust, the pleadings do not show that he has a wife, the insertion in the decree of a provision that the title shall vest in the complainant, free and clear of any right and estate of dower and homestead, is not reversible error.—*Schultz v. Schultz*, Ill., 30 N. E. Rep. 317.

7. APPEAL—Reversal.—A judgment of the Illinois appellate court, reversing a judgment of the trial court, without either remanding the cause for a new trial or reciting the facts as found by the appellate court, is erroneous.—*Scoville v. Miller*, Ill., 30 N. E. Rep. 440.

8. APPEAL—Writ of Prohibition.—Under Gen St. § 1299, which provides that, when a rule is granted by the superior court to show cause why a writ of prohibition should not issue, the court may examine and decide on

the truth as well as the sufficiency of the facts arising in the cause, and, if it finds sufficient ground, shall issue a writ of prohibition, an appeal will lie from its decision. — *Fayerweather v. Monson*, Conn., 23 Atl. Rep. 878.

9. ARBITRATION— Waiver of Defects.— Where a party to an arbitration learns facts which make an arbitrator incompetent, but thereafter proceeds with the hearing without objecting to his incompetency, and takes the chances of a favorable decision, he will be deemed to have waived his objection, and will not be permitted to raise the same after an award has been made.—*Anderson v. Burchett*, Kan., 29 Pac. Rep. 315.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An instrument in writing executed by insolvent debtors, whereby they place all their property, consisting of a stock of general merchandise, in the exclusive possession of a third person, whom they style a trustee, and by the terms of such instrument give detailed direction as to how the business shall be conducted in the future, and provide for the payment of certain creditors *pro rata*, and that the remainder shall be returned to themselves, heirs, or assigns, is intended to and has the effect to leave the absolute control of their business in their own hands, and is absolutely void.—*Brigham v. Jones*, Kan., 29 Pac. Rep. 308.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS—Fraud. —An assignor, just before making an assignment, drew out of the bank $963, and gave the same to his wife, who kept it secreted for eight months. This sum, which constituted the greater part of the available assets, was not included in the inventory and schedules. After the existence of this fund had been discovered by the creditors by legal proceedings, the money was paid to the assignee: *Held*, that this concealment rendered the assignment void, although the assignor swore that he did not intend to defraud his creditors, but merely to hold said money for whomever it belonged to.—*Coursey v. Morton*, N. Y., 30 N. E. Rep. 231.

12. ATTORNEYS — Right to Compensation.— Where a firm of attorneys is retained to procure the granting of a license to sell liquor, under an agreement that they are to be paid a certain sum cash and the balance "whenever a license to sell liquor is obtained or can be obtained," they cannot recover the balance when their efforts to procure a license prove fruitless, but afterwards a license is obtained through the efforts of other parties.—*Chenney v. Kelly*, Ala., 10 South. Rep. 664.

13. ATTORNEY AND CLIENT — Evidence—Admissions.— In an action by an attorney for services rendered, it is admissible to ask defendent if, on a certain occasion, he did not state that he would pay plaintiff what he "owed" on certain conditions, notwithstanding defendant has testified generally that any offer of payment he made was for the purpose of avoiding litigation, and not because he was indebted, since a party cannot render an admission incompetent by testifying that he intended it to bring about a compromise, unless there was in fact an honest controversy between the parties, and a treaty pending or proposed to settle it without litigation. — *Steeg v. Walls*, Ind., 30 N. E. Rep. 312.

14. ATTORNEY AND CLIENT — Services — Evidence.— Where an attorney writes several letters to his client, presenting his claim for services according to the agreement between them, and the client fails to respond, or deny any of the statements therein, the letters are admissible as evidence of the contract.—*Murphey v. Gates*, Wis., 51 N. W. Rep. 573.

15. ATTORNEY AND CLIENT — Settlement between Parties.—Code Civil Proc. § 66, declaring that an attorney shall have a lien upon his client's cause of action or counter-claim, which shall attach to a judgment in the latter's favor, and that this lien shall not be affected by any settlement between the parties, does not prevent the parties from coming to a settlement; and the court is warranted in setting the settlement aside only in case it will operate prejudicially upon the attorney by depriving him of his costs, or turning him over to an irresponsible client. — *Poole v. Belcha*, N. Y., 30 N. E. Rep. 53.

16. BOUNDARIES—Ways — Easement. — Where the description in a deed is by metes and bounds, which are complete in themselves, and which are so made as to exclude a certain road, a reference to the road for the purpose of designating the point from which the description starts and the course of a line therefrom does not show an intention to make the road the boundary of the land, except as it coincides with the description in the deed; and the grantee, therefore, is not entitled, upon the discontinuance of the road as a public way, to claim an easement therein, as appurtenant to the premises, against the grantor.— *Lankin v. Terwilliger*, Oreg., 29 Pac. Rep. 268.

17. CARRIERS—Bill of Lading.—A bill of lading, signed by a shipper of live-stock and defendant railroad, released defendant from damage or loss from "breaking, chafing, weather, fire, or water, except where collision or running from the track resulting from negligence" of defendant's agents shall cause the same: *Held*, that the breaking of an animal's leg was not such "breaking" as was contemplated in the bill of lading, and plaintiff could recover under defendant's common law liability as a carrier of live stock. — *Coupland v. Housatonic R. Co.*, Conn., 23 Atl. Rep. 870.

18. CARRIERS— Passengers — Pleading. — Where in an action for personal injuries the declaration alleges that the plaintiff was a passenger on defendant's train between certain stations, and the proof shows that plaintiff was a passenger between two other stations, the termini alleged being the intermediate stations, between which the accident happened, the variance between the declaration and the proof is fatal to recovery.—*Wabash Western Ry. Co. v. Friedman*, Ill., 30 N. E. Rep. 353.

19. CHATTEL MORTGAGES — Possession and Power of Sale.—Where a mortgage given on a baker's stock in trade permitted the mortgagor to retain possession of the goods, which he continued to sell in the regular course of business, and the mortgagee from time to time purchased such goods from the mortgagor, such sales were clearly made with the mortgagee's knowledge and consent. — *Rocheleau v. Boyle*, Mont., 29 Pac. Rep. 872.

20. CHATTEL MORTGAGE— Priority of Liens.—Where a chattel mortgage securing several notes which mature at different times does not state which note is to be paid first out of the proceeds of the mortgaged property, a contemporaneous parol agreement between mortgagor and mortgagee, to the effect that the note maturing after the others is to be first paid out of such proceeds, cannot be shown in defense to an action on said note, since in the absence of any stipulation to the contrary, the note first maturing constitutes the prior lien.— *Schultz v. Plankinton Bank*, Ill., 30 N. E. Rep. 346.

21. CHATTEL MORTGAGE—Property not in Existence.— Where a mortgage is executed on certain machinery before it is manufactured, an action by the mortgagee for its subsequent conversion cannot be maintained, since such mortgage creates only an equitable lien on the machinery. — *Deeley v. Dwight*, N. Y., 30 N. E. Rep. 258.

22. CONSTITUTIONAL LAW—Counties. — Const. art. 11, § 6, prohibits a county from contracting "any debt by loan in any form, except for the purpose of erecting necessary public buildings, making and repairing public roads and bridges," and forbids such indebtedness exceeding in any one year certain rates on the taxable property in the county: *Held*, that the drawing of warrants against a special fund already provided, and certain to be paid in during the fiscal year, where the amount of warrants does not exceed the amount of such fund, is not the creation of a debt, within the constitution, though it anticipates the revenue to be collected, since the warrants are drawn against existing values. — *Hockaday v. Board County Com'rs of Chaffee County*, Colo., 29 Pac. Rep. 287.

23. CONSTITUTIONAL LAW—Title of Act.—Act March 11' 1889, entitled "An act to establish a State reform school for juvenile offenders, and to make an appropriation therefor," and providing (section 16) for the committal to such school of "any boy or girl between the ages of ten and sixteen years who has been convicted of an offense punishable by imprisonment in the county jail or penitentiary," and, in cases of offense punishable by imprisonment in the county jail, giving the court discretion to commit the offender to the jail, does not violate Const. art. 4, § 24, providing that "every act shall embrace but one subject, which subject shall be expressed in its title."—*Ex parte Liddell*, Cal., 29 Pac. Rep. 251.

24. CONTRACTS.—A third person, not in privity with the parties to a contract, is not concluded by the writing by which they have evidenced their agreement. He may show that the writing was not intended to express the real agreement.—*National Car & Locomotive Builder v. Cyclone Steam Snow-plow Co.*, Minn., 51 N. W. Rep. 657.

25. CORPORATIONS—Fixing Salaries.—The action of the board of directors of a corporation in providing that the salary of the president, whom they had elected, should be fixed by him and another director, who together owned nearly all the stock, is such an exercise of the board's authority to fix his salary as to constitute a contract on which he can recover.—*Bagaley v. Pittsburgh & L. S. Iron Co.*, Penn., 23 Atl. Rep. 837.

26. CORPORATIONS—Sale — Stockholders.—The stockholders of a corporation, having had knowledge of the action of the directors in directing all its property to be sold and conveyed, and not having taken any steps to condemn or prevent it, will be held to have ratified the execution and delivery of the deed.—*Stokes v. Detrick*, Md., 23 Atl. Rep. 846.

27. COUNTY BOARD — Special Allowance.—Where an indispensable public necessity exists, a contract by the county board with the county clerk, whereby he is to receive a specified compensation for indexing and rearranging the papers and files in his office, is authorized by section 5766.—*Board v. Mitchell*, Ind., 30 N. E. Rep. 409.

28. COURTS—Contempt.—A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is a civil action.—*Leopold v. People*, Ill., 30 N. E. Rep. 348.

29. COURTS—Jurisdiction—Tort Committed in Another State.—Where a railroad company obtains charters from the States of Alabama, Mississippi, and Tennessee, the courts of Alabama have no jurisdiction to entertain an action against the company for negligently killing plaintiff's intestate in the State of Mississippi, since the tort was committed by a foreign corporation in a foreign State.—*Kahl v. Memphis & C. R. Co.*, Ala., 10 South. Rep. 661.

30. CRIMINAL EVIDENCE — Homicide — Threats.—On trial for murder, threats made by defendant against deceased four months before the killing are admissible in evidence.—*Pate v. State*, Ala., 10 South. Rep. 665.

31. CRIMINAL EVIDENCE—Murder—Insanity.—Evidence that defendant, indicted for shooting his wife, was in trouble with his family, and was disturbed in mind and perhaps somewhat excited, is not sufficient to raise a reasonable doubt in regard to his sanity.—*Montag v. People*, Ill., 30 N. E. Rep. 337.

32. CRIMINAL LAW—Appeal-bond.—An appeal from a conviction is not a "criminal action or proceeding," within Gen. St. § 1614, providing that an attorney shall not become recognized or give any bond in any criminal action or proceeding in which he shall be interested as an attorney.—*State v. Costello*, Conn., 23 Atl. Rep. 868.

33. CRIMINAL LAW—Assault with Intent to Kill—Malice.—While malice is an essential ingredient under section 6821, Rev. St., to constitute the offense of assault with intent to kill, as it also is to that of murder in either degree under the statutes of this State, nevertheless a court, in charging a jury on the trial of a defendant under an indictment charging an assault with intent to kill, is not bound, at the request of counsel, to instruct the jury that they should not convict the accused with assault with intent to kill, if, in case death had resulted to the party assaulted, the homicide would have been manslaughter only, and that they could only so convict him if, in case of death, the homicide would have been murder.—*State v. Stout*, Ohio, 30 N. E. Rep. 437.

34. CRIMINAL LAW—Election between Offenses.—Defendant was indicted for the unlawful killing of a bull, and one of the witnesses testified, on examination by the State, that he saw the defendant, on a certain Friday, shoot the bull with a double barrel shot gun: *Held*, that the prosecutor was not compelled to elect to prosecute for the shooting at that particular time, but could prove, by the same witness, a shooting on the following Monday.—*Jackson v. State*, Ala., 10 South. Rep. 657.

35. CRIMINAL LAW — Embezzlement.—A clerk, who withdraws from the money-drawer of a cash-register money that he had deposited a moment before without registering the sale of the article for which it had been received, is guilty of embezzlement.—*Commonwealth v. Ryan*, Mass., 30 N. E. Rep. 354.

36. CRIMINAL LAW — Gaming — Instructions.—It was error for the trial court, after charging that a mere preponderance of evidence was not sufficient to convict defendant, to add that "it is not required that the inculpatory facts shall be incompatible with the innocence of the accused," since, in order to convict an accused person, the facts proven must be inconsistent with any reasonable hypothesis of his innocence.—*People v. Gosset*, Cal., 29 Pac. Rep. 246.

37. CRIMINAL LAW—Homicide—Self-defense.—In order to excuse a homicide, the accused must be under the belief that his life is in danger, or he fears some great bodily harm may be inflicted upon him; and said belief must be the result of some overt act or hostile demonstration made by the deceased against the accused.—*State v. Jackson*, La., 10 South. Rep. 600.

38. CRIMINAL LAW—Justifiable Homicide.—Defendant asked the court to instruct the jury that if defendant shot believing that unless he did so deceased would cut him, then they should acquit, unless defendant brought on the difficulty: *Held*, that the instruction was properly refused; it basing a right to kill on a mere belief, without any reasonable grounds for the belief.—*Askew v. State*, Ala., 10 South. Rep. 657.

39. CRIMINAL LIBEL—Indictment.—Under Code, § 3771, providing that any person who publishes a libel of another, which tends to provoke a breach of the peace, shall be guilty of a criminal offense, an indictment for criminal libel, which fails to charge that the libel tended to provoke a breach of the peace, is insufficient.—*Moody v. State*, Ala., 10 South. Rep. 670.

40. CRIMINAL PRACTICE — Arson. — An indictment against several defendants, which charges that they agreed to burn a certain building, and in pursuance of that agreement did burn it, is not bad for duplicity, since the conspiracy to burn is merged in the consummated act of burning, and the offense charged is arson only.—*Hoyt v. People*, Ill., 30 N. E. Rep. 315.

41. CRIMINAL TRIAL.—In a criminal prosecution it is error to send a bailiff into the jury-room to instruct the jury as to the return of their verdict.—*Quinn v. State*, Ind., 30 N. E. Rep. 300.

42. CRIMINAL TRIAL — Homicide — Instructions.—A charge to a jury in a criminal case, in which the judge limits himself to instructing the jury as to the law in the case, and refrains from recapitulating the evidence so as to influence them, and does not repeat or state the testimony of a witness, and does not give an opinion as to what facts have been proved or disproved, affords no ground of complaint.—*State v. Dennison*, La., 10 South. Rep. 599.

43. CRIMINAL TRIAL—Recalling Jury.—Where the jury is recalled, after retiring to consider the verdict, and given defendant's charge previously refused, it is not error of which defendant can complain.—*Shepherd v. State*, Ala., 10 South. Rep. 663.

44. DECEIT—Confidential Relations.—Where an heir, who has undertaken to settle up the estate, induces a co-heir to sell to him her interest in the real estate at less than its value by falsely representing that there is a claim against the estate, to pay which the real estate must be sold, and that it cannot be sold for more than a certain amount, such co-heir may recover against him for deceit and false representations.—*Hulett v. Kennedy*, Ind., 30 N. E. Rep. 310.

45. DEED—Construction.—A deed, which in the recital of parties refers to a certain person and wife as parties of the second part, but does not afterwards refer to the wife in any of the granting or operative clauses, but only to the husband, must be construed as a conveyance to the husband alone.—*National Bank of Boyertown v. Hartman*, Penn., 23 Atl. Rep. 842.

46. DEED—Conveyance of Homestead.—A quitclaim deed is a "grant," within the meaning of Civil Code, § 1243, providing that a homestead can be abandoned only by a declaration of abandonment or a "grant" thereof, executed by the husband and wife.—*Faivre v. Daley*, Cal., 29 Pac. Rep. 256.

47. DEED — Quitclaim — Interest Conveyed.—A party receiving a quitclaim deed for real estate is presumed to take it with notice of all outstanding interests and claims of which he could obtain knowledge by the exercise of a reasonable degree of diligence, in the examination of all of the public records affecting the title to the property included in such deed, and from inquiries which he might make of persons whom the records show had redeemed the property from tax-sale and had paid subsequent taxes thereon, or were otherwise ostensibly interested in such property.—*Smith v. Rudd*, Kan., 29 Pac. Rep. 310.

48. DEED—Will.—An instrument in the form of a deed, executed by a husband on his death-bed, conveying all his property to his wife, signed, sealed, and acknowledged, and delivered to a physician, with instructions that it should be kept for his wife until his death, and then recorded, is a deed, and not an attempted testamentary disposition of the property.—*Deifendorf v. Deifendorf*, N. Y., 30 N. E. Rep. 375.

49. EMINENT DOMAIN — Condemnation Proceedings.—In proceedings to condemn a railroad right of way through land distant three-eighths of a mile from a large and growing city, and one-eighth of a mile from a platted and improved addition thereto, with which it is connected by two roads, a map made from actual survey and measurement, representing the land as subdivided by extending the streets of the city and addition, is competent evidence to show the value of the land from its susceptibility to be platted advantageously, and consequent adaptability for residences.—*Ohio Valley Railway & Terminal Co. v. Kerth*, Ind., 30 N. E. Rep. 298.

50. EVIDENCE—Parol.—In an action by the grantors of property to restrain the grantee from using it for the sale of intoxicating liquors, evidence is admissible of a parol agreement that part of the consideration for the grant was that the property should not be used for such purposes.—*Hall v. Solomon*, Conn., 23 Atl. Rep. 876.

51. FIRE INSURANCE COMPANIES — Guaranty Fund.—A contract between a mutual fire insurance company and its policy-holders, whereby the latter establish a fund for the purpose of guarantying the existing and future indebtedness of the company, is *ultra vires* and void, where the power to make such a contract is not expressly conferred upon the company by its charter, and is not within its general powers for raising a fund to meet its losses and expenses.—*Kennan v. Rundle*, Wis., 51 N. W. Rep. 426.

52. FRAUDULENT CONVEYANCE—Assignment for Benefit of Creditors.—Where an assignment for the benefit of creditors is made with an actual fraudulent intent, in which the assignee participates, and the assignment is set aside at the suit of creditors, the assignee is chargeable with all money paid out by him for appraising the property, for counsel fees, and for expenses of conducting the business after the assignment, since such payments were necessarily made by him in pursuance of the fraudulent scheme.—*Smith v. Wise*, N. Y., 30 N. E. Rep. 229.

53. FRAUDULENT CONVEYANCE—Mortgages.—The giving by a mortgagor, directly to the assignee of the mortgage, a new mortgage and note, in substitution of the old, and in consideration of the release of the old, in good faith and without view to insolvency or purpose of preference, is valid, though followed within 60 days by proceedings in insolvency.—*Porter v. Welton*, Conn., 23 Atl. Rep. 868.

54. GARNISHMENT.—Rev. St. Mo. § 473, provides that when a person cannot be summoned, and his property has been attached by a justice, the justice may make an order requiring the plaintiff to give him notice by advertisement: *Held*, that such a service does not confer jurisdiction upon the justice where the only attachment is by garnishment of wages, which are exempt by the laws of Indiana and Missouri; and judgment suffered by the garnishee in Missouri is no protection, therefore, to an action for such wages in Indiana.—*Terre Haute & I. R. Co. v. Baker*, Ind., 30 N. E. Rep. 431.

55. GARNISHMENT—Clerk of Court.—In the course of the trial of an action the defendant made a tender of money to the plaintiff, which was refused. The defendant then placed the money in the hands of the clerk of the court, to be paid to the plaintiff if he would accept it. The court made no order relative to the receiving or holding of the money by the clerk: *Held*, that the conduct of the clerk in receiving and holding the money was not within the scope of his official duty, and he was liable to garnishment.—*Marine Nat. Bank of Duluth v. Whiteman Paper Mills*, Minn., 51 N. W. Rep. 665.

56. GUARDIAN'S BOND—Pleading.—In an action on a guardian's bond, the conditions of which were that he should faithfully discharge the office "according to law," render an account "as he shall be thereto required by said court," comply with all the orders of said court, and render and pay all moneys, goods, etc., to the minors or any subsequent guardian, it was sufficient to allege that he did not faithfully discharge the trust according to law, that he did not render fair accounts, and that he failed to account for the rents of certain realty, and to take proper care of and obtain sufficient rent for the same; it being unnecessary to aver that the court had ordered him to account and to pay the moneys in his hands to the minors or his successors, and that he had disobeyed such orders.—*Gebhard v. Smith*, Colo., 29 Pac. Rep. 303.

57. HIGHWAYS.—Where the owners of land make no objection to its use for a public road, and it is used and traveled as such by the public for more than 10 years, the presumption is that it has been abandoned to the public, and it becomes a public highway, under Pol. Code, § 2618, which defines a public highway to be a road, etc., erected or laid out as such by the public, or, if laid out or erected by others, dedicated or abandoned to the public.—*Patterson v. Munyan*, Cal., 29 Pac. Rep. 250.

58. HIGHWAYS—Defects.—Under Pub. St. ch. 52, § 19, and St. 1888, ch. 114, providing that a person who seeks to recover from a town for injuries occasioned by a defect in a highway must give notice of the time, place, and cause of the injury, but that no notice shall be deemed invalid or insufficient solely by reason of any "inaccuracy" in the statement of any such matters, a statement that the injury happened on a sidewalk where there was a hydrant, without any attempt whatever to designate the particular place of the injury, is a fatal defect.—*Gardner v. Inhabitants of Town of Weymouth*, Mass., 30 N. E. Rep. 363.

59. HIGHWAYS — Validity of Proceedings. — A road supervisor who pleads, in justification of an alleged wrongful entry upon the land of another, that he was acting in obedience to an order of the board of county supervisors establishing a highway, need not file with his answer a transcript of the board's proceedings, since, when it has jurisdiction, its proceedings are attended with the same presumption of regularity as are

those of a court of general jurisdiction, and are not susceptible of collateral attack.—*Chicago & A. Ry. Co. v. Sutton*, Ind., 30 N. E. Rep. 291.

60. HUSBAND AND WIFE—Enticement of Husband.—Since the statutes have given to married women the right to sue alone for injuries to their persons and property, a married woman is entitled to sue in her own name one who wrongfully entices her husband from her, and thereby deprives her of his society and support.—*Wolf v. Wolf*, Ind., 30 N. E. Rep. 308.

61. INJUNCTION—Writ of Possession.—Where plaintiff in ejectment had judgment on the ground that defendant who was then tenant under one E, entered into possession as tenant under plaintiff, and was therefore estopped to deny plaintiff's title, a writ of possession against E on the judgment will be restrained; E's title not having been adjudicated.—*Moulton v. McDermott*, Cal., 29 Pac. Rep. 259.

62. INSOLVENCY — Homestead.—Where an insolvent debtor has acquired a homestead estate in land of greater value than the limit of the homestead exemption, an assignment in insolvency by the debtor transfers the surplus to the assignee, who may maintain a writ of entry to recover the land subject to the right of homestead.—*Copeland v. Sturtevant*, Mass., 30 N. E. Rep. 475.

63. JUDGMENT — Lien — Recording.—Hill's Code, § 271, which provides that a conveyance of real estate, or any interest therein, shall, as against the lien of a judgment, be void, unless recorded, applies to conveyances which, if recorded, would give notice, but does not apply to the equities of plaintiffs, which require the aid of a court to establish.—*Meier v. Kelly*, Oreg., 29 Pac. Rep. 265.

64. JUDGMENT—Nunc pro Tunc.—Where plaintiff recovers a verdict in a personal action, and defendant, having given notice immediately upon its return of his intention to move for a new trial, makes the said motion within a few days thereafter, and then dies pending the motion, which motion is afterwards dismissed, the action, having thus been merged in the verdict, does not abate by the death of the defendant; but the court may enter a judgment *nunc pro tunc*, as of time while the defendant was still living, even though no efforts had been made by the plaintiff before the filing of the said motion, and during the term to which the verdict was returned, to obtain judgment.—*Hilker v. Kelley*, Ind., 30 N. E. Rep. 304.

65. LANDLORD — Negligence — Fire escapes. — Section 2573, Rev. St. as enacted April 19, 1883, which makes it the duty of any owner of any tenement-house of more than two stories high to provide a convenient exit from the different upper stories which shall be easily accessible in case of fire, is intended, as a primary object, to secure means of safe egress by tenants occupying the upper stories of such buildings in case of fire, and applies as well to those who occupy the second story as to occupants of the higher stories.—*Rose v. King*, Ohio, 30 N. E. Rep. 267.

66. LANDLORD AND TENANT—Forcible Entry.—Pending an appeal to the circuit court from a judgment in forcible entry and detainer, defendant, in order to avoid giving an additional appeal-bond, surrendered the key of the leased premises, and made a payment on the rent: *Held*, that plaintiff's acceptance of the key and the money did not bar him from recovering judgment in the circuit court.—*Patterson v. Graham*, Ill., 30 N. E. Rep. 460.

67. LEASES — Subletting — Covenant.—A lessee, after subletting the premises with a covenant of quiet enjoyment, became insane, and, his estate being insolvent, his committee refused to pay the rent to his landlord, and the subtenant, neglecting to protect his possession by paying the superior landlord, was dispossessed by him: *Held*, that the estate of the lunatic was liable only for nominal damages for breach of the covenant, it being due to no fault of his, and the subtenant having had repaid to him such rent as he had paid in advance, and there being no mesne profits for which he was liable.—*In re Strasburger*, N. Y., 30 N. E. Rep. 379.

68. LIMITATIONS—Color of Title.—A deed from one to whom a tax deed, regular on its face, has been issued, constitutes color of title, within the meaning of the statute of limitations, where the grantee takes it in good faith, without knowledge of any defects, even though the tax-deed was not supported by any judgment, and the person to whom it was issued was under legal obligations to pay the taxes for which it was sold.—*Lewis v. Pleasants*, Ill., 30 N. E. Rep. 323.

69. LIMITATION OF ACTIONS.—In an action for work done under an express contract which was not fully performed, each party accused the other of causing the work to be stopped. Most of the work was done more than five years before the action was begun: *Held* error to charge that, even if plaintiff was entitled to recover under an implied contract for the work actually done, he could only recover for that part of the work done within five years of the commencement of the action, since, as the work was an entirety, the statute of limitations did not begin to run against any of it till the plaintiff ceased working.—*O'Brien v. Sexton*, Ill., 30 N. E. Rep. 461.

70. MALICIOUS PROSECUTION—Probable Cause.—Where it appeared, in an action for malicious prosecution, that the writ for the arrest of plaintiff in the action complained of was issued by a judge having full jurisdiction, who on a subsequent hearing of testimony, including plaintiff's, ordered plaintiff's commitment, probable cause is shown. — *Cooper v. Hart*, Pa., 23 Atl. Rep. 833.

71. MASTER AND SERVANT— Assumption of Risk.—The absence of the safeguards with which Laws 1886, ch. 409, as amended by Laws 1887, ch. 462, requires all machinery, gearing, and belting to be provided, imposes upon the owner no liability for injury to an employee who, knowing their absence, voluntarily meddles with the machine.— *White v. Witteman Lithographic Co.*, N. Y., 30 N. E. Rep. 236.

72. MASTER AND SERVANT — Assumption of Risks — Questions for Jury. — Where a window over a stairway leading into the back yard has been broken for a long time, exposing the stairs to an accumulation of snow and ice, and a servant, by reason of their slippery condition falls and is injured, it is a question for the jury whether the occupant of the premises was negligent in allowing the stairs to be in that condition; and it cannot be said, as a matter of law, that the fact of its being the duty of another servant to keep them clean would relieve her from liability.— *Mahoney v. Dore*, Mass., 30 N. E. Rep. 366.

73. MASTER AND SERVANT—Evidence—Conflict of Laws. — Where, in an action prosecuted in this State by a servant against his master to recover for personal injury resulting to him from the negligence of another servant of the same master, it appears that the accident causing the injury occurred in the State of Pennsylvania, that the contract of employment was made in that State, and that all the stipulated services were to be performed therein, no recovery can be had if by the laws of Pennsylvania no right of action arose from the transaction, though the laws of Ohio would give full relief had the transaction occurred within this State.—*Alexander v. Penn Co.*, Ohio, 30 N. E. Rep. 69.

74. MASTER AND SERVANT — Fellow Servant.—A railroad company is not liable for the negligence of the conductor of a switch-engine who has charge of making up freight trains in its yard, under St. 1887, ch. 270, which relates to accidents due to the negligence of one who has "charge or control of any signal, switch, locomotive engine, or train upon a railroad."— *Thyng v. Fitchburg R. R.*, Mass., 30 N. E. Rep. 169.

75. MASTER AND SERVANT—Independent Contractor.—In an action for injuries caused by the alleged negligence of defendant, the owner of a rolling-mill, it appeared that it contracted with a third person to heat scrap iron, and that the heater himself hired and paid for the necessary assistance in his work. Plaintiff was hired by the heater, and was injured while in discharge of his duty. The superintendent of the rolling-mill had the power to discharge the heater, but had noth-

ing to do with hiring the helpers, keeping their time, or paying them, though he could discharge a heater if the latter should refuse, when requested by the superintendent, to discharge any of his helpers: *Held*, that the heater, and not defendant, was plaintiff's employee. —*New Albany Forge & Rolling-Mill v. Cooper*, Ind., 30 N. E. Rep. 294.

76. MASTER AND SERVANT — Negligence.—In an action against a railroad company by a day laborer, employed on defendant's track, for personal injuries received in a collision, the mere averments in the complaint that plaintiff was riding on the tender to an engine for the purpose of reaching his place of work, and that he was riding with his back to the engine were insufficient to overcome plaintiff's general averment of freedom from fault, and to render the complaint demurrable.—*Cincinnati, I., St. L & C. Ry. Co. v. Darling*, Ind., 30 N. E. Rep. 416.

77. MASTER AND SERVANT —Negligence.—Placing a car in motion on a track where it is known that men may be, without any person being on the car, and without any means of stopping it, is evidence tending to prove negligence, although there is no public crossings at the place.—*Lake Shore & M. S. Ry. Co. v. Hundt*, Ill., 30 N. E. Rep. 458.

78. MORTGAGES.—Where a mortgagee executes a power authorizing a person to forclose the mortgage without notice to him, a person who goes into possession of the mortgaged premises without proving any title, and relying merely on an equity in favor of a third person, with which he does not connect himself, is not entitled to notice relative to proceedings in the foreclosure. —*Wing v. De la Rionda*, N. Y., 30 N. E. Rep. 243.

79. MORTGAGES — Subrogation. — Plaintiff purchased land from one M, who placed in plaintiff's hands certain notes to secure her against a mortgage on the land. The mortgage was subsequently satisfied of record, and plaintiff, after collecting the notes and accounts, sold the land and took a mortgage for the purchase money: *Held*, in an action by plaintiff to foreclose her mortgage, that M might intervene and be subrogated to the lien of said purchased money mortgage to the amount due on account of the notes, where the right of third persons are not affected thereby. — *McGuffey v. McClain*, Ind., 30 N. E. Rep. 296.

80. MUNICIPAL CORPORATION — Control of Streets. — The use of the street by the plaintiff for his water pipes being allowed by license, there was no enjoyment adverse to the city. Nor had the city power, by grant to give plaintiff any right in the street inconsistent with the future legitimate uses of the street by the city. Hence, no right by prescription to maintain the pipes in the street would vest in the plaintiff, although he had enjoyed the use more than 21 years, and any damage accruing to plaintiff by removing the pipes, and thus interrupting the flow of water through them, would be *damnum absque injuria*.—*Elster v. City of Springfield*, Ohio, 30 N. E. Rep. 274.

81. MUNICIPAL CORPORATION — Defective Streets — Electric Wires.—Where several boys had been playing on their way home in a public street, and had stopped to rest, and one of them, while walking along before the others, came in contact with an electric wire which had been allowed to hang within a few feet of the street, and from which he received a severe shock, the fact that just before the injury he had been using the street for the purpose of play did not divest him of the character of a traveler, within Pub. St. ch. 52, § 1, which declares that the street shall be kept in repair so that the same may be reasonably safe for "travelers."—*Graham v. City of Boston*, Mass., 30 N. E. Rep. 170.

82. MUNICIPAL CORPORATION—Eminent Domain.—In a proceeding by a city to acquire the fee in a public street, the abutting owners thereof are entitled to substantial damages. — *In re City of Buffalo*, N. Y., 30 N. E. Rep. 233.

83. MUNICIPAL CORPORATION — Franchise Tax.— The city of New Orleans granted a franchise to a street railroad company for a gross money consideration, the charter providing for an annual tax upon its real estate and fixtures according to an assessment to be made in the usual mode: *Held*, that there was no implied exemption from further taxation, and the contract was not impaired by the levy of an annual franchise tax under Acts La. No. 101, § 8.—*New Orleans City & L. R. Co. v. City of New Orleans*, U. S. S. C., 12 S. C. Rep. 406.

84. MUNICIPAL CORPORATION—Public Improvements.—Laws 1891, p. 137, provides for the mode of improving the streets of the city of Indianapolis, and the payment of such improvements, and confers on the city power to contract for sprinkling and sweeping streets in the city, and to assess the cost against the property holders abutting on such streets: *Held*, that an assessment made against an owner of property along a street required to be swept, to pay the expense of such sweeping, is not a tax, but a local assessment.— *Reinken v. Fuehring*, Ind., 30 N. E. Rep. 414.

85. MUNICIPAL CORPORATION—Sewers.—Farming lands, drained only by surface drainage, cannot be specially assessed for the construction of an under-ground city sewer, three miles away, where the ordinance for the construction of the sewer makes no provision for the connection of the surface drains with the sewer.—*Edwards v. City of Chicago*, Ill., 30 N. E. Rep. 350.

86. NEGLIGENCE — Dangerous Premises. — Where one lets a dock for unloading stone, charging toll for each boat-load and there was no suggestion at the time that any one else had any interest in the dock, it is no defense to an action by a boatman for personal injuries caused by the unsafe condition of the dock that the legal title to the unsafe part of the dock was in a third person, or that in fact the defendant had no legal right to go upon or repair it.—*Thomas v. Henjes*, N. Y., 30 N. E. Rep. 238.

87. NEGOTIABLE INSTRUMENT — Bank. — A bank may sue as payee on a note payable to its cashier.—*Erwin Lane Paper Co. v. Farmers' Nat. Bank of Constantine*, Ind., 30 N. E. Rep. 411.

88. NEGOTIABLE INSTRUMENT — Officer of Corporation. —Where nothing appears in the body of a note to indicate who is the maker, and it is signed by a person who affixes to his name an official title as officer of a corporation, the note is *prima facie* that of the person so signing; but it is so far ambiguous in respect to the question whether the officer or the corporation is the maker that parol testimony is admissible to settle it. If, however, the note is signed by the corporate name, followed by the name of a corporation officer, who affixes to his name his official title, such note is conclusively taken to be corporation paper.— *Reeve v. First Nat. Bank of Glassboro*, N. J., 23 Atl. Rep. 853.

89. NUISANCE— Dangerous Premises—Duty of Owner. The possessor of lands or tenements is not at liberty to plant in them dangerous instruments, which may seriously injure trespassers; but he is under no duty to keep his premises in a safe condition for others than those whom he invites, and therefore he is not liable to trespass for injuries they may receive from defects, not amounting to traps, in such premises.—*O'Conner v. Illinois Cent. R. Co.*, La., 10 South. Rep. 678.

90. NUISANCE—Husband and Wife.—Where the title and possession of premises damaged by a private nuisance are in the wife, an action will not lie therefor by the husband, although he lives on said premises, and supports the family.—*Kavanaugh v. Barber*, N. Y., 30 N. E. Rep. 235.

91. PARTITION.—While an order directing partition of land and appointing commissioners is final as to the right to partition, it remains open to await the report of the commissioners, and does not preclude the court from adjudging, in accordance therewith, that the land is not divisible, and from ordering it to be sold.—*Roach v. Baker*, Ind., 30 N. E. Rep. 310.

92. PARTITION—Improvements by a Co-tenant.—Where a tenant in common has been in sole possession, and has in good faith, and without any intention of embar-

rassing his co-tenants or hindering partition or gaining an advantage therein, improved the land, while his co-tenants have neglected their claim thereto, equity will, in partition proceedings, whenever possible, allot to such tenant the portion of the land improved by him or, if this be impossible, require his co-tenants to reimburse him for such improvement.—*Ferris v. Montgomery Land & Imp. Co.*, Ala., 10 South. Rep. 607.

93. PARTNERSHIP—Death of Partner.—Where the surviving members of a partnership carry on the business until the appointment of an administrator for the deceased member, using in the mean time the capital of the deceased with the consent of those who represent five-sevenths of his estate, and against the objection of those representing the other two-sevenths, interest is not to be paid on the said capital.—*Robinson v. Simmons*, Mass., 30 N. E. Rep. 362.

94. PARTNERSHIP—What Constitutes.—Plaintiff made a written agreement with a person engaged in business, to enter into the business, and advance $5,000 and take general charge of the office finances, books, correspondence, accounts, sales or other matters connected with the business. The agreement also provided that, "as compensation for his services and the use of the money so advanced by him, he shall receive a salary of twenty-five dollars a week, and such a proportion of the net profits of said business as said sum of five thousand dollars shall bear to the total present net investment in said business:" *Held*, that said agreement constituted plaintiff a partner in the said business.—*Fougner v. First Nat. Bank of Chicago*, Ill., 30 N. E. Rep. 442.

95. PAYMENT—Receipt as Evidence.—In an action for services rendered the issue was whether the work was extra or was part of the work called for by a contract between the parties. Defendant put in evidence a receipt, which was a final estimate and statement of account of all the work done under the contract, and in which it was shown that a balance was due plaintiffs, and that they received such balance in full of such account: *Held*, that the receipt did not conclude plaintiffs from asserting a claim for extra work, being only *prima facie* evidence of payment.—*Ohio & M. Ry. Co. v. Crumbo*, Ind., 30 N. E. Rep. 434.

96. PLEADING—Abatement.—Where U, one of the defendants, who was a non-resident, appeared and answered on the merits, and the other defendants joined in an answer in abatement, on the ground that the cause of action, if any, was in another county, in which they resided, but it did not appear from the answer in abatement that U was not a resident of the county where the action was brought, the answer in abatement was demurrable.—*Brown v. Underhill*, Ind., 30 N. E. Rep. 430.

97. PLEADING—Adverse Claim to Land.—In an action under the statute to determine an adverse claim to real estate the defendant is called upon to disclose by his answer the nature of his claim or title, which thereupon becomes the subject of adjudication. If he sets up a legal title, his proof must be confined to a claim of that character. If the claim is an equitable one, equitable rules and principles must govern.—*Stuart v. Lowry*, Minn., 51 N. W. Rep. 662.

98. PLEADING—Set-off.—Where a plaintiff joins in his complaint separate paragraphs of action on contract and tort, defendant may plead a set-off to either of the paragraphs on contract, but not to the paragraph on tort, nor to the entire complaint, as that would include the paragraph on tort.—*Howlett v. Dills*, Ind., 30 N. E. Rep. 313.

99. PLEDGE—Care of Goods.—Where the pledgee of goods, to whom a warehouse receipt has been delivered, does not claim or exercise his right to the exclusive and absolute control of the goods pledged, but permits the pledgeor to have free access to them, it is equally the duty of the pledgeor to care for them, when he knows they are in danger, and make the damages as little as possible; and, if he fails to do so, he cannot hold the pledgee responsible for the loss.—*Willets v. Hatch*, N. Y., 30 N. E. Rep. 251.

100. PRINCIPAL AND AGENT.—Decedent deposited money with defendant to be invested, in the latter's discretion, in speculations in stocks and securities for the benefit of decedent and at her risk. While defendant was acting in good faith, and in conformity with the agreement, the money was lost, and defendant partially reimbursed decedent from her own means, without disclosing the loss: *Held*, that defendant was not liable to decedent's estate for the loss.—*Stewart v. Parnell*, Penn., 23 Atl. Rep. 888.

101. PRINCIPAL AND AGENT—Infant.—Where a minor purchases hay as agent for his father, and payment is made therefor, and afterwards the father sells his farm, but the son remains thereon, and subsequently purchases more hay, without stating who the real purchaser is, and, after it is partially delivered at such farm, the seller learns that the father is not the purchaser or sole purchaser, the seller is put on inquiry, and the mere statement of the son that his father will pay for the hay is insufficient to establish the son's agency, and the seller cannot recover for hay subsequently delivered.—*Nuckolls v. St. Clair*, Colo., 29 Pac. Rep. 284.

102. PUBLIC LAND—Homestead Entry.—Act Cong. May 14, 1880, § 2, provides that where any person has contested, paid the land-office fees, and procured the cancellation of any homestead entry he shall be allowed 30 days from date of notification of such cancellation to enter such lands: *Held*, that such right of entry is personal, and a contract by such person to relinquish the right to another is so clearly against public policy that equity will not decree specific performance thereof.—*Dameron v. Dingee*, Colo., 29 Pac. Rep. 305.

103. RAILWAY COMPANIES—Killing of Cattle.—In an action against a railroad company for the killing of cattle by defendant's train, where defendant sought to show that the animals were killed at a highway crossing, plaintiff had the right to prove that there were cattle tracks along the railroad near the point where plaintiff claimed his cattle were killed, without proof that the tracks were made by the animals actually killed.—*Ohio & M. Ry. Co. v. Wrape*, Ind., 30 N. E. Rep. 427.

104. RAILROAD COMPANIES—Negligence—Evidence.—A section of a sewer pipe standing on the edge of an excavation, and within 18 to 24 inches of the rail of a horse car track, was struck by a passing car so that it fell into the excavation and injured a workman there. Before reaching the place the driver stopped the car, and did not proceed until he was notified to do so by the foreman in charge of the workmen: *Held*, that it was not shown that the driver was negligent.—*Schmidt v. Steinway & H. P. Ry. Co.*, N. Y., 30 N. E. Rep. 389.

105. RAILROAD COMPANIES—Taxation.—The act of April 15, 1889, (section 251*a*, Revised Statutes), requiring "every corporation or company operating a railroad or any part of a railroad within this State" to pay to the commissioner of railroads and telegraphs a "fee" of one dollar per mile for each mile of track operated by it within this State, contravenes sections 2 and 5 of article 12 of the constitution of this State.—*Pittsburg, C. & St. L. Ry. Co. v. State*, Ohio, 30 N. E. Rep. 435.

106. RAILROAD IN STREET—Negligence—Frightening Horses.—Where an owner of a dummy engine is permitted by law to use it in a street, the escape of steam therefrom is not evidence of negligence on the owner's part, though it frightened a horse, which, in its efforts to run away, ran against and injured a person on the sidewalk.—*Howard v. Union Freight R. Co.*, Mass., 30 N. E. Rep. 479.

107. RAILWAY BONDS—Notice of Trust-deed.—Where a series of railway mortgage bonds secured by a trust-deed covering the road, property, and franchises of a railway company is issued, and reference is made to such trust-deed on the face of the bonds, holders of such bonds, and the coupons attached to the same, are put upon inquiry by the recitals in the bonds, and charged with notice of the terms of such trust-deed, and are bound by the conditions therein.—*Guilford v. Minneapolis, S. Ste. M. & A. Ry. Co.*, Minn., 51 N. W. Rep. 658.

108. RAILWAY COMPANIES— Injuries at Crossings.— In an action against a railroad company for injuries alleged to have been caused by defendant's negligence, whereby plaintiff was struck at a highway crossing by defendant's train, a judgment for plaintiff will not be reversed because an instruction as to the duty of defendant's employees failed to state the duty of a traveler on the highway to look and listen for an approaching train, where other instructions stated fully such duty of plaintiff, and the jury found specially that plaintiff performed such duty. — *Lake Erie & W. Ry. Co. v. Carson*, Ind., 30 N. E. Rep. 432.

109. REPLEVIN—Property in Hands of Sheriff.—Hill's Code, § 256, authorizes replevin on an affidavit showing, *inter alia*, that the property had not been "seized under an execution or attachment against the property of plaintiff:" *Held* that, where property was in the possession of a sheriff under an execution against defendant in an action wherein plaintiff was not a party, replevin will lie against such sheriff for the possession of such property.—*Scott v. McGraw*, Wash., 29 Pac. Rep. 260.

110. SALE—Parol Evidence.—Where a bill of sale has been given which contains a warranty of title, all oral statements made previous to the giving of such bill of sale, concerning the transaction, are inadmissible, the presumption of law being that the written instrument contained the entire contract, unless fraud is shown.—*McMullen v. Carson*, Kan., 29 Pac. Rep. 317.

111. SALE—Warranty.—A contract for the sale of twine on future delivery contained a guaranty by the seller "that this twine is in good condition and a merchantable article:" *Held*, that the guaranty referred to the condition of the twine at the date of the contract.—*Luthy v. Waterbury*, Ill., 30 N. E. Rep. 352.

112. SALE OF LAND—Parol Evidence.—An agreement to grade a street and have city water put into it, made as an inducement for one to buy a lot bounded on it, is an independent collateral agreement, which need not be included in the deed, and can be shown by parol.—*Durkin v. Cobleigh*, Mass , 30 N. E. Pep. 474.

113. SET OFF — Right to Recoup — Damages.—Where one of two partners gave his individual note in part payment for some horses purchased by the firm, and the seller gave a written warranty that the horses were sound at the time of the sale, it was error for the court, in an action by the seller on the note, to refuse to allow the other partner to be made a party to a cross action for breach of the warranty, and to refuse to permit the firm to recoup, as the damages sought to be recovered grew out of the same transaction in which the indebtedness was contracted.—*Strang v. Murphy*, Colo., 29 Pac. Rep. 298.

114. STATUTES — Pleading Construction.—In pleading the construction of a statute of another State by the courts thereof, it is sufficient to aver what the courts have decided under such statute; it not being necessary to set out the facts on which the decision was rendered, nor to refer to the cases by title, nor when or where reported.—*Angell v. Van Schaik*, N. Y., 30 N. E. Rep. 395.

115. TAX-SALE—Lien of Purchaser.—A tax-sale, though in violation of mandatory provisions of the statute, vests in the purchaser the lien of the State, except where the sale was void because the land was not subject to taxation, or the taxes had been paid, or the description in the deed was insufficient to identify the land, or the sale was unauthorized.—*Scarry v. Lewis*, Ind., 30 N. E. Rep. 411.

116. TAX-TITLES — Costs.—Including salaries of town officers in the tax levy of a village corporation renders the tax illegal, and a sale under a judgment for non payment thereof void; and such a case is within the exception contained in the amendment of 1879 to the revenue law, providing that the judgment for sale shall not be conclusive as to a title based thereon, where the real estate was not liable to the tax.—*Gage v. Goudy*, Ill., 30 N. E. Rep. 320.

117. TRADE-MARK — Corporate Name.—A foreign corporation, whose name has not become a trade-mark or trade name, has no right to restrain a domestic corporation from using a corporate name similar to its own, especially where the domestic corporation was incorporated before the other.—*Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, Ill., 30 N. E. Rep. 339.

118. VENDOR AND VENDEE—Deceit.—Where there was evidence that a vendor knowingly misrepresented to his vendee that he owned an appurtenant right of way over adjoining land, it was error, in an action for such fraud, to nonsuit the vendee; and, the land, having been conveyed "with all privileges and appurtenances thereunto belonging," it was immaterial that the deed did not expressly mention the right of way.—*Durkin v. Cobleigh*, Mass., 30 N. E. Rep. 474.

119. VENDOR AND VENDEE—Defective Title.—A vendee cannot refuse to accept title because of the pendency of an action to set aside for fraud a deed to one of the vendor's predecessors in title, where the vendor is not a party to such action, and there is no averment in the complaint therein that he participated in such fraud, or had any knowledge thereof.—*Aldrich v. Bailey*, N. Y., 30 N. E. Rep. 264.

120. VENDOR AND VENDEE— Parol Contract.—Where a person acquired land of which his grantor claimed to be the equitable owner by reason of a parol contract with the holder of the legal title, but which contract was repudiated by the other party thereto, the fact that the grantee, with full knowledge of the facts, took possession of the land, and made valuable improvements thereon, can add no weight to his claim to the land.—*Boulder Valley Ditch Mining & Milling Co. v. Farnham*, Mont., 29 Pac. Rep. 277.

121. WATER COMPANIES — Violation of Regulations.—A water company may make reasonable rules for the government of its customers in the use of its water supply, and enforce such rules by shutting off the customer's supply of water, as a penalty for violation thereof, when such rules are embodied in its contract with its customers, or such contract is made subject to the rules, and the customer is furnished with a copy thereof; the courts reserving the right to say, in any particular case, whether or not the rules are reasonable.—*Shiras v. Ewing*, Kan., 29 Pac. Rep. 320.

122. WILL— Construction.—A testator devised to his wife certain real property, and bequeathed her all his personal property of every description. He devised specific real property to certain charitable institutions, and bequeathed to complainant a legacy of $3,000. He devised to defendants "all the rest, residue, and remainder of [his] real estate, without any exception." The real property included in this residuary devise was worth $100,000, and the personalty bequeathed to his wife amounted to $20,000: *Held*, that complainant's legacy was a charge on the residuary devise.—*Reid v. Corrigan*, Ill., 30 N. E. Rep. 444.

123. WILL — Revocation. —A widow is an "unmarried woman," within the meaning of Rev. St. art. 3, tit. 1. ch 6, providing that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage."—*In re Kaufman's Will*, N. Y., 30 N. E. Rep. 242.

124. WILL— Testamentary Powers .— A testator gave his wife the use and income of one third part of a house and lot for her life, and authorized his executors to lease the remaining two-thirds of said house and lot, to pay all taxes, expenses, and repairs thereon, and divide the residue of the income thereof among the testator's children: *Held*, that the executors had power to rent the entire house, but that all the taxes, expenses, and repairs should be taken out of the children's two-thirds of the rent, especially where that construction of the will has been acquiesced in for years by all the interested parties.— *Starr v. Starr*, N. Y., 30 N. E. Rep. 384.

125. WILLS — Who may Contest. — One has no standing to impeach a will unless he shows that he is testator's heir, and would inherit his estate were it not for the will. — *Franke v. Shipley*, Oreg., 29 Pac. Rep. 268

ABSTRACTS OF DECISIONS OF THE MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

AGENCY — "Application for Loan" — Evidence.—The fact that plaintiff, a mortgagor, in negotiating a loan from the defendant company signed a formal "application for loan" which contained in fine print an appointment of a certain party as plaintiff's agent for procuring the loan which it appeared, plaintiff did not see, will not make such third party plaintiff's agent where it appears that such third party had been for some time in defendant's employment of agent, kept an account in bank of their money in his hands as "agent," had been accustomed to transact other similar negotiations for them, and that in transmitting money to him to close plaintiff's loan defendants had evidently treated him as their agent, giving minute instructions as to the general transaction of their business, and the loss of such money by the agent's embezzlement must be borne by the defendants. Affirmed.—*Milstead v. Equitable Mtge. Co.*

CONTRACT—Implied Agreement—Evidence.—Plaintiffs and defendant sent their produce to market in a single shipment. A check was made to plaintiffs in payment of both. Plaintiffs gave defendant their own check in payment of his share. Plaintiff's check was paid by the vendee's check but was dishonered, the bank being temporarily in the hands of an examiner and payments suspended. Plaintiffs urged defendant to join them in the collection of the check by legal proceedings, and upon his declining to do so, proceeded to collect it themselves at an expense of $182.85 which need not have been incurred, had plaintiffs waited two months: *Held*, that no one can be compelled to pay for services rendered without request or assent, express or implied, and that plaintiffs could not recover of defendant a proportionate share of this expense. Affirmed.—*Mansur v. Murphy.*

CONTRACT—Service of Stallion—Statute.—1. Where the advertised terms of service of a mare by a stallion were "ten dollars to insure a mare with foal, money due when the fact is ascertained or mare parted with," the owner of the mare does not render himself liable, by selling the mare before the expiration of the time of the delivery of the foal, if she prove not to be in foal. 2. Rev. St. § 6732, providing that the owner of a stallion, jack or bull shall advertise terms of service, and that the owner of the female animal served shall be deemed to have assented to said terms, does not preclude a special agreement between the parties but only makes such terms conclusive in the absence of a special agreement. Affirmed.—*Sturgeon v. Merritt.*

NEGLIGENCE—Personal Injury—Evidence — Instructions.—1. In a suit for damages by an employee for personal injuries caused by the falling of an elevator, where plaintiff alleges that the accident occurred in consequence of the fact that the elevator itself, the machinery and appliances thereto were in a defective condition, with ten separate and distinct specifications of defects he cannot be compelled to elect on which one of the specifications he will go to trial, if they are not repetitions of each other nor inconsistent with each other. 2. Where it appeared in such a case that the elevator had been in use for eleven years; that it had no counterbalance or descending weight, now generally used, but then not usual in elevators; that it went with a jerking motion; sometimes caught and bound up; often worked in a shackley way, and finally inflicting the injuries complained of; that there was then discovered to be broken in a certain parts of it, particularly in a certain pinion, but which could not be discovered without taking apart the drum of the elevator which would take three men fifteen hours: *Held*, that it was not error to submit the case to the jury. 3. In the case of an injury inflicting a permanent disability upon an infant it is not error to permit the jury to find damages for any loss of earnings after plaintiff shall have arrived at the age of 21 years. 4. It was proper to instruct that the care required of the plaintiff was such "as boys of his age, experience and discretion usually exercise." 5. That the elevator did not belong to defendants but was a part of the building leased by the defendants is immaterial in view of the master's duty to use reasonable care and inspection in regard to machinery and appliances placed by him in the hands of his servants, and to insert such an hypothesisin an instruction is error. 6. Nor is the master's duty affected by the fact that the elevator is run by an engineer employed by the owner of the building. Affirmed.—*Bartley v. Trorlicht.*

WATER-COURSE—Diversion—Damages.—1. Where lands have been flooded by reason of the obstruction or diversion of a water-course by the erection of a permanent structure, the damage is not original and complete upon the completion of the structure so as to debar a tenant, who subsequently leases the premises, from action to recover damages caused by a subsequent freshet. 2. Where such tenant is a tenant for a year only, and has no right of subletting, the rental value of the flooded land is not an element of his damages, and he is entitled to recover only the value of the crops destroyed. 3. The recovery of such damage for one year is not a bar to an action for similar damages incurred in another year. Reversed.—*McKee v. St. Louis, etc. R. Co.*

KANSAS CITY COURT OF APPEALS.

MECHANIC'S LIEN—When Filed.—In an action to enforce a mechanic's lien under a general contract for the erection of several buildings on lots not contiguous: *Held*, that under Sec. 6709, R. S. 1889, which provides that the lien must be filed within a specified period, "after the indebtedness shall have accrued," the indebtedness becomes complete when the last labor is performed or the last material furnished; accrued does not mean due; the work ormaterial on one building cannot extend the time for filing lien for work or material on another building erected under the same contract but on a distant lot.—*Bolen Coal Co. v. Ryan.*

MUNICIPAL CORPORATIONS—Powers.—In an action to enjoin the payment of money by the city under an ordinance to give aid to the National Guards of Missouri: *Held*, the exercise by the city of any police power not within the limitation of its charter is a municipal usurpation and void; the general welfare clause of the charter of a city, which follows a long list of specified powers, like the one here, should not be construed so as to enlarge the powers of the city further than is nec essary to carry into effect the specific grants of power. Injunction sustained.—*Knapp v. Kansas City.*

PARTIES—Mechanic's Lien Suit.—In a suit to enforce a mechanic's lien instituted in a justice's court against the contractors and owners of the premises, the contractors were not notified and did not appear to the action: *Held*, that under Sec. 6713 and 6725, R. S. 1889, the parties to the contract should be made parties to suit. In all cases except that provided in Sec. 6164, the statute requires that there must be a personal judgment against the contractor; otherwise, there would be no judgment which the owner's property could be condemned to satisfy. Waiver of defect of parties, unless the objection be made by demur or answer, is limited by the statement on which that rule is based (Secs. 2047 and 2038), to actions in courts of record. As there was neither constructive or personal service upon the contractors, there can be no judgment at all.—*Johnson-Frazier Lumber Co. v. Scheuller.*

PLEADING—Divorce Causes. — In a suit for divorce it is not necessary to allege in the petition that the plaintiff is a resident of the county in which action is brought. The provision of the statute (Sec. 4501, R. S. 1889) that, "the proceedings shall be had in the county where the plaintiff resides," is only intended to prescribe the venue, a statemeut of which need not be set out in the petition. This opinion being in conflict with that expressed by the St. Louis Court of Appeals in Pate v. Pate, this cause is transferred to the Supreme Court.—*Grant v. Grant.*